No. 2491.

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RIALTO IRRIGATION DISTRICT, A CORPORATION,
Plaintiff in Error.
vs.
N. W. STOWELL,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

F. A. LEONARD,
HOWARD SURR,
LEONARD and SURR.
Attorneys for Rialto Irrigation District.

John Flagg, Brief and Transcript Printing a Specialty, San Bernardino, Cal.

No. 2491.

UNITED STATES

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

RIALTO IRRIGATION DISTRICT, A CORPORATION,
Plaintiff in Error.
vs.
N. W. STOWELL,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

The plaintiff in error is an irrigation district organized under the laws of the State of California, under what is commonly known as the "Wright Act." The questions involved in this case and two other cases, No. 2392 and 2493, which, by stipulation and order of Court, are to stand submitted upon the record and briefs in this case, (Transcript, pages 149, 151,) involve nearly two hundred thousand dollars and are of far reaching importance, not only to the plaintiff in error, but to numerous other irrigation districts in the State, which have heretofore issued bonds in amounts aggregating many millions of dollars.

This action was originally brought on June 27th, 1908, by defendant in error, to recover $30,009.00, together with interest, alleged to be due upon certain coupons issued by the plaintiff in error. (Tr., pgs. 15, 16.) Subsequently on July 5th, 1912, the defendant in error filed an amended and later a supplemental complaint, increasing his demand to $50,577.70, together with interest. (Tr., p. 48.)

The plaintiff in error issued its bonds in the amount of $500,000.00, bearing date November 17th, 1890. They were all of the same tenor. One of such bonds is set out in full in the amended complaint. (Tr., p. 20.) To these bonds were attached installment coupons and also interest coupons. Defendant in error sues to recover upon both installment and interest coupons. The answer to the amended complaint admits that the officers of the district purported to issue said bonds, but avers that none of them were ever lawfully issued and that all of the acts of its officers in issuing the bonds were unauthorized and void; that none of the bonds were properly dated or made payable as required by law; that none of them were issued for a valid or lawful consideration, and that all of the coupons maturing four years or more before being sued upon were barred by the Statute of Limitations. (Tr., pgs. 37-38.) The court gave judgment for the full amount sued for, without compounding interest. (Tr., p. 50.) Both parties have sued out writs of error. The defendant in error claims the court should have given him judgment for compound interest or interest upon all overdue in-

terest coupons, in addition to the amount allowed him, while plaintiff in error contends that the judgment of the court should have been in its favor. The bill of exceptions appears on pages 51 to 124 of the transcript.

The specifications of error, as assigned, (Tr., 126-131,) here follow and thereafter, the argument, in which the specified errors, which seem most important, are discussed.

Specifications of Error.

1. The court erred in overruling the defendant's demurrer to the amended complaint, for the reason that said amended complaint does not state facts sufficient to constitute a cause of action.

2. The court erred in overruling said demurrer as to the first count of said complaint, for the reason that said first count does not state facts sufficient to constitute a cause of action.

3. The court erred in overruling said demurrer as to the second count of said complaint, for the reason that said second count does not state facts sufficient to constitute a cause of action.

4. The court erred in rendering the judgment made and entered in this cause, for the reason that the amended complaint does not sustain said judgment, nor any part thereof.

5. The court erred in rendering said judgment, for for the reason that the supplemental complaint does not sustain said judgment nor any part thereof.

6. The court erred in rendering said judgment, for

the reason that no findings of fact were made or filed, and such findings were not waived.

7. The court erred in rendering said judgment, for the reason that no proper or sufficient findings of fact were made or filed, and such findings were not waived.

8. The court erred in rendering said judgment, for the reason that the facts found expressly or by implication, are not sufficient to justify the conclusions based thereon or the said judgment, and particularly in the following respects:

(a) The facts so found show that none of the bonds alleged in the amended complaint or in the supplemental complaint bore date at the time of their issue, as required by the statute authorizing the issue of bonds by the defendant.

(b) Said facts show that none of said bonds ran, by their terms, for the length of time they were required to run by the provisions of said statute,

(c) Said facts show that none of said bonds were negotiable in form, as required by the provisions of said statute.

(d) Said facts show that certain coupons alleged and sued upon in the amended complaint matured more than four years prior to the commencement of the action, and the alleged cause of action as to each and all of said coupons was barred by statute of limitations, as pleaded in the defendant's amended answer.

(e) Said facts show that certain coupons alleged and sued upon in the supplemental complaint matured more than four (4) years prior to the filing of said supple-

mental complaint, and the alleged cause of action as to each and all of said coupons was barred by statute of limitation, as pleaded in said amended answer (said answer and plea, by stipulation, being made to apply as an answer and plea to said supplemental complaint).

9. The court erred in making its findings of fact, express or implied, for the reason that certain of such findings, necessary to sustain the conclusions and judgment of the court, were not justified by the evidence, and were without substantial support by any evidence, and particularly in the following respects:

(a) There was no evidence to justify or support the finding to the effect that said bonds or any of chem bore date at the time of their issue.

(b) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, ran by their terms, or ran in fact, for the term or period prescribed by statute.

(c) There was no evidence to justify or support the finding to the effect that said bonds, or any of them were negotiable in form, or in the form required by the statute under which they are alleged to have been issued.

(d) There was no evidence to justify, or support the finding to the effect that said bonds, or any of them, were issued or delivered for a lawful or valid consideration.

(e) There was no evidence to justify or support the finding to the effect that said bonds, each and all of them, were not issued or delivered for a consideration,

which, wholly or in great part, consisted in the doing of construction work for the defendant.

(f) There was no evidence to justify or support the finding to the effect that none of said bonds were issued or delivered for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant.

(g) There was no evidence to justify or support the finding to the effect that said bonds, or any of said bonds, were issued or delivered to any purchaser or taker on November 17, 1890, or on January 1, 1891, or at the time of their actual date or their apparent date or their alleged date.

(h) There was no evidence to justify or support the finding to the effect that said bonds, or any of them, were ever lawfully issued, or were lawful obligations of the defendant.

(i) There was no evidence to justify or support the finding to the effect that the board of directors of the defendant, on December 12th, 1890, or at any time, brought an action in the Superior Court of San Bernardino counts to determine the validity of said bonds, or any of them.

(j) There was no evidence to justify or support the finding to the effect that on January 3, 1891, or at any time, said superior court, by a judgment duly given and made in said action or given or made at all, declared said bonds or any of them to be valid.

(k) There was no evidence to justify or support the finding to the effect that the plaintiff acquired or pur-

chased said bonds or coupons, or any of them, in good faith and in the ordinary course of business, without knowledge or notice of their invalidity, or of any defense thereto.

(i) There was no evidence to justify or support the finding to the effect that the plaintiff did not acquire or purchase said bonds and coupons, or any of them, with notice or knowledge of each or any of the facts alleged in the defendant's amended answer to the amended complaint as grounds of their invalidity and as defenses thereto.

(m) There was no evidence to justify or support the finding to the effect that none of the causes of action alleged in the amended complaint, as to any of the coupons therein sued upon, was barred by statute of limitation, as pleaded in the defendant's amended answer.

(n) There was no evidence to justify or support the finding to the effect that none of the causes of action alleged in the supplemental complaint, as to any of the coupons therein sued upon, was barred by statute of limitation, as pleaded in said amended answer.

10. The court erred in rendering its said judgment, for the reason that the amount of said judgment is in excess of the aggregate amount of all coupons alleged and sued upon in the amended complaint and the supplemental complaint.

ARGUMENT.

Point I.

The Court erred in rendering said judgment for the

reason that certain coupons sued upon in the amended complaint and in the supplemental complaint matured more than four years prior to the commencement of the action, and the alleged cause of action as to each and all of said coupons was barred by the Statute of Limitations, as pleaded in the defendant's amended answer. (Subdivisions (d) and (e) of Specification 8). (Tr., p. 128.)

In the amended answer of plaintiff in error, the Irrigation District pleaded that as to all coupons, including both interest and principal coupons, which by their terms were payable four years or more before the commencment of the action, the action was barred by the provisions of section 443, (intending thereby to mean 343) by the provisions of subdivision 1 of section 337 and of subdivision 1 of section 338 of the Code of Civil Proceedure of the State of California. (Tr., p. 38.)

By stipulation, this plea and answer were made applicable to the supplemental complaint. (Tr., pgs. 40-41.)

Sections 337 and 338 are found in Chapter III of title II of Part II of the code, which title specifies the time within which actions must be commenced in this State, and subdivision I of section 337 is as follows:

"Within four years:—

> 1. An action upon any contract, obligation or liability founded upon an instrument in writing executed within this State; provided, that whatever the time within which any such action must be so commenced would in any case expire by the terms of this section after the first day of June, one thousand nine hundred and six and before the first day

of January, one thousand nine hundred and seven, such action may be commenced at any time before the first day of January, one thousand nine hundred and seven, with the same force and effect as if commenced within four years as in this section provided." (All italics in this brief are ours.)

Subdivision I of section 338 is as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture."

Section 343 of the same code is as follows:

"ACTIONS FOR RELIEF NOT HEREINBEFORE PROVIDED FOR. An action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

As if to emphasize the well established rule that statutes of limitation embrace *all kinds of actions*, and do not admit of any exception—not specified by the legislature—being made to their operation and comprehensiveness, it is further provided in Section 312 of Title II of Part II of the same code that:

'COMMENCEMENT OF CIVIL ACTIONS. Civil actions, *without exception*, can *only* be commenced within the periods prescribed in this title, after the cause of action shall have accrued, unless where, in special cases, a different limitation is prescribed by statute."

It cannot be for an instant successfully contended that, with respect to Irrigation District Bonds, a special limitation has been prescribed by the legislature, and therefore, all of the language of this section following

the word "accrued" may be dismissed from consideration, and we respectfully submit that, in the face of such plain and unambiguous language, no construction can be placed upon Section 312, whereby an exception to its unmistakable terms can be imported therein, without striking down the well-settled principle, that the courts will not undertake to insert in a statute something which has been omitted therefrom. This well-founded rule has been crystallized in our Code of Civil Procedure by section 1858, which says:

> "In the construction of a statute or instrument, the office of the judge is simply to ascertain and declare what is in terms or in substance contained therein, *not to insert what has been omitted*, or to omit what has been inserted; and where there are several provisions or partiuclars, such a construction is, if possible, to be adopted as will give effect to all."

Upon the same subject, in City of Eureka vs. Diaz, 89 Cal., 467, says the California Supreme Court:

> "It is a cardinal rule in the construction of statutes that the intent of the legislator should be followed, but this is subject to the imperative and paramount rule that the court cannot depart from the meaning of language which is free from ambiguity, although the consequence would be to defeat the object of the act. In Rex vs. Barham, 8 Barn. & C., 99, the court said: 'Our decision may, in this particular case, operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to

what we may suppose to have been the intention of the legislature.' In Smith vs. State, 66 Md., 217, the court said: 'Even when a court is convinced that the legislature really meant and intended something not expressed by the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of language which is free from ambiguity. As was said by Lord Denman in Green vs. Wood, 7 Ad. & E., N. S., 185: 'Those who used the words thought that they had effected the purpose intended. But we, looking at the words as judges, are no more justified in introducing that meaning than we should be if we added any other provision. We can do no more than give such a meaning as the words authorize.' The Supreme Court of Ohio in Woodbury vs. Barry, 18 Ohio, 462, emphatically say: 'It is our legitimate function to interpret legislation, but *not to supply its omissions*.'

"The business of the interpreter is, of course, to seek for the intention of the legislature; but that intention is not to be ascertained at the expense of the true meaning of the words. 'The court knows nothing of the intention of an act, *except from the words* in which it is expressed, * * the meaning of the law being the law itself * * Every departure from the clear language of a statute is, in effect, an assumption of legislative powers by the court.' "

See also U. S. vs. Hartwell, 18 L. Ed., (U. S.,) 832.

U. S. vs. Wiltberger, 5 Wheat, 92, and Endlich on Interpretation of Statutes, pages 6, 7, 8, 9, 10 and 11.

Referring to the adding of exceptions by the courts, to statutes of limitations, the California Supreme Court, in Tynan vs. Walker, 35 Cal., 634, says:

> "If they may add at all to the exceptions provided for in the statute, under the pretense that the case before them is of equal equity with those given in the statute, who is to fix the limit to their interpolations, or establish the line between legislative and judicial functions? If they may add one to the list of excepted cases, by parity of reason they may add another, and so on until the entire body of the statute has become emasculated, and the will of the judiciary substituted for that of the legislature. How much more in keeping with the legitimate exercise of judicial functions are those cases where it has been held that *the Courts can create no exceptions where the legislature has made none.* * * * Said Mr. Chancellor Kent, (page 142:)
>
> "The doctrine of an inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and I believe, uniformly exploded. General words in the statute must receive a general construction, and *if there be no express exception, the court can create none.*"

Again in Morrow vs. Barker, 119 Cal., 65, the same court says:

> "Here is a statute of limitations. The holder of no claim is excepted from its disability, saving him alone who has been absent from the State. A court *is not authorized to make an exception* to relieve from hardship or to aid apparent equities."

It was also said in Vandall vs. Teague, 142 Cal., 471, that:

> "The statute of limitations is a general statute, and must be applied generally and *in all cases* where exception to its operation is not specifically made."

It would seem argument is superfluous, respecting the obvious meaning of the statute and of the authorities we have cited, unless we attribute to the English language an utter inability to convey thought or intent, and when section 312 C. C. P., expressly says that civil actions, *without exception*, can *only* be commenced within the periods prescribed in Title II of the Code, "after the cause of action shall have accrued," it becomes important to ascertain *when the cause of action accrued* in the case at bar and in the solution of this question; as well as in determining the scope and meaning of these limitations of actions prescribed by our State legislature, we submit this court will be guided by the decisions of the Supreme Court of this State.

Referring to the Statute of Limitations, in the case of Mather vs. San Francisco, 115 Fed., 37, this court adopted the principle announced in Leffingwell vs. Warren, 17 L. Ed., (U. S.,) 261, and said:

> "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the Statute of Limitations of the several States, and give them the same construction and effect which are given by the local tribunals." (Citing cases.)

The Supreme Court of the United States in the Leffingwell case, also said:

> "The construction given to a statute of a State by the highest judicial tribunal of such State, is regarded as a part of the Statute, and is as binding

upon the courts of the United States as the text. (Citing Cases.)

"If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court *will follow the latest settled adjudications*. (Citing cases.)

In Ross vs. Duval, 10 L. Ed., (U. S.) 51, the United States Supreme Court said:

"As an act of limitation, it is impossible to distinguish this from other acts which limit the time of bringing certain actions, either by a designation of the ground or the form of the action.

These acts are of daily cognizance in the courts of the United States; and no one has ever doubted, that in fixing the rights of parties, *they must be regarded as well in the Federal* as in the State courts."

In Dibble vs. Bellingham Co., 41 L. Ed., (U. S.) 72, the same court said:

"No rule is more firmly established than that this court will follow the construction given by the Supreme Court of a State to a statute of limitations of a State (Bauserman v. Blunt, 147 U. S., 647 (37: 316), and we perceive no reason for disregarding it in this instance."

In Balkham vs. Woodstock Iron Co., 38 L Ed., (U. S.), 953, the same Court said:

We think the rule under which we follow state statutes of limitation and the construction of such statutes by the state courts compels us to treat the doctrine here announced as conclusive of the present case, so far as this court is concerned. The

whole subject was very fully reviewed by this court in the case of Bauserman vs. Blunt, 147 U. S., 647 (37: 316). There, through Mr. Justice Gray, we said:

" 'By a provision inserted in the first Judiciary Act of the United States, and continued in force ever since, Congress has enacted that 'the laws of the several States, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply'. Act of September 24, 1789, Chap. 20, Sec. 34, 1 Stat., at L. 92; Rev. Stat., 721. No laws of the several States have been more steadfastly or more often recognized by this court, from the beginning, as rules of decision in the courts of the United States, than statutes of limitations of actions, real *and personal*, as enacted by the legislature of a State, and as construed by its highest court. (Citing cases).

"In Patton vs. Easton, 14 U. S., 1 Wheat, 476, 482 (4: 139, 141), and again in Powell vs. Harman, 27 U. S. 2 Pet., 241 (7: 411), this court had construed a Tennessee statute of limitations of real actions in accordance with decisions of the Supreme Court of the State, made since the first of those cases was certified up to this court, and supposed to have settled the construction of the statute. Yet in Green vs. Neal, 31 U. S., 6 Pet., 191 (8: 402), a judgment of the Circuit Court of the United States, which had held itself bound by those cases in this court, was reversed, because of *more recent decisions* of the State court, establishing the opposite construction."

"Nor can the case before us be saved from the

operation of the rule thus stated by the contention that the Supreme Court of the State of Alabama has misconstrued its statutes or has adopted a rule of limitation or prescription in conflict therewith. In Leffingwell vs. Warren, 67 U. S., 2 Black, 599, 603 (17: 261, 262), Mr. Justice Swayne, speaking for the court, thus laid down the rule:

"'The Courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statutes of limitations of the several States, and give them the same construction and effect which are given by the local tribunals. They are a rule of decision under the 34th section of the Judicial Act of 1789. The construction given to a statute of a State by the highest judicial tribunal of such State is regarded as a part of the statute, and is as binding upon the courts of the United States as the text. If the highest judicial tribunal of a State adopt new views as to the proper construction of such a statute, and reverse its former decisions, this court will follow the *latest settled adjudication*.' "

In Metcalf vs. Watertown, 38 L. Ed., (U. S.) 861, the same court also said:

"From the beginning this court has recognized statutes of limitations of actions, real *and personal*, as enacted by the legislature of a State, and as construed by its highest court, as rules of decision in the courts of the United States. * * * * *

"It would be strange, if in the now well understood rights of nations to organize their judicial tribunals according to their notions of policy, it should be conceded to them in every other respect than that of prescribing the time within which suits

shall be litigated in their courts. Prescription is a thing of policy, growing out of the experience of its necessity; and the time after which suits or actions shall be barred has been, from a remote antiquity, fixed by every nation in virtue of that sovereignty by which it exercises its legislation for all persons and property within its jurisdiction. This being the foundation of the right to pass statutes of prescription or limitation, may not our States, under our system, exercise this right in virtue of their sovereignty? Or is it to be conceded to them in every other particular, than that of barring the remedy upon judgments of other States by the lapse of time?''

Upon the same subject, in Tioga R. Co. vs. Blossburg, and C. R. Co., 22 L. Ed., (U. S.) 331, Mr. Justice Bradley, in delivering judgment said:

''These decisions upon the construction of the statute are binding upon us, whatever we may think of their soundness on general principles''.

And in the concurring opinion in the same case, it is said:

''Statutes of limitation are in their nature arbitrary. They rest upon no other foundation than the judgment of a State as to what will promote the interests of its citizens. Each determines such limits and imposes such restraints as it thinks proper.

''In Angell on the Limitation of Actions at Law, at p. 14, Sec. 24, the author says: 'Under the 34th section of the Judiciary Act of 1789, 1 Stat. at L. 73, the Acts of Limitations of the several States, where no special provision has been made by Congress, form a rule of decision in the courts of the

United States, and the same effect is given to them as is given in the State courts.' ''

See also: McClaine vs. Rankin, 49 L. Ed., (U. S.) 702; Campbell vs. Haverhill, 39 L. Ed., (U. S.) 280; Lindsey vs. Gas Co., 55 L. Ed., (U. S.) 369; Brown Forman Co. vs. Kentucky, 54 L. Ed. (U. S.) 883; Flanigan vs. Sierra County, 49 L. Ed., (U. S.) 597; McClung vs. Silliman, 7 L. Ed., (U. S.) 676; Davie vs. Briggs, 24 L. Ed., (U. S.) 1086; Brunswick Terminal Co. vs. Bank, 99 Fed., (C. C. A.) 635; Fearing vs. Glenn, 73 Fed., (C. C. A.) 116; Bergman vs. Bly, 66 Fed., (C. C. A.) 40.

It is very clear that an action involving bonds is not immune from the application of the principles announced in the foregoing authorities, as those authorities show that the Federal Courts follow the State Courts in their construction of statutes of limitation, regardless of the subject matter which such statutes cover, and irrespective of whether the action in question be a real or personal one. In harmony with these views, in the case of Amy vs. Dubuque, 25 L. Ed., (U. S.) 228, where the plaintiff sued upon some municipal bonds, Mr. Justice Harlan, speaking for the court said:

> "The question of limitation presented for our consideration upon this writ of error depends for its solution upon the statutes of Iowa. 'It is not to be questioned,' said this court in Hawkins vs. Barney, 5 Pet., 457, that laws limiting the time of bringing suit constitute a part of the *lex fori* of every country; they are laws for the administering justice, one of the most sacred and

important of sovereign rights.' '' McElmoyle vs. Cohen, 13 Pet., 312.

It is as little to be questioned that "The courts of the United States, in the absence of legislation upon the subject by Congress, recognize the statute of limitations of the several States, and give them the same construction and effect which are given by the local tribunals." Leffingwell v. Warren, 2 Black, 599 (67 U. S., XVII, 261); Green vs. Neal, 6 Pet., 291; Harpending vs. Dutch Co., 16 Pet., 455; Davis vs. Briggs, 97 U. S., 628 XXIV, 1086.

In the light of this doctrine and again adverting to section 312 of the Code of Civil Procedure, we are now brought to the question as to when the statute commenced to run against the holder of these bonds, and the determination of this question necessarily, under section 312, depends upon the time of the accrual of the respective causes of action set forth in the amended and supplemental complaints herein. This is undeniable, because section 312, C. C. P., provides that "civil actions, *without exception*, can only be commenced within the periods prescribed in this title, *after the cause of action shall have accrued.*"

From this language, it is apparent the cause of action in any case must accrue before the statute is set in motion, and it is equally manifest that if the various causes of action sued upon herein have not accrued, then the defendant in error has no standing in this court. Furthermore—as in other investigations which relate to the statute of limitations—the federal courts, when it comes to deciding upon the time *when the statute commences to*

run, will follow the decisions of the highest court of the State, in which that question is agitated. In Balkham vs. Woodstock Iron Co., 38 L. Ed. (U. S.), 953, the United States Supreme Court said:

> "When the bar of the statute of prescription, under the laws and decisions of the State of Alabama, *began to be operative*, has been construed by the court of last resort of that State. Necessarily the determination of when the parties had a right to sue was a question concerning the construction when the prescription commenced to run, or when they were obliged to bring their action, whethor legal or equitable. Those questions were purely within the province of the Supreme Court of Alabama. In deciding them it passed upon its own statutes of limitations or the doctrine of prescription as applied by it, and *we are obliged to apply and enforce their conclusions*"

We respectfully submit that it requires no citation of authority to show that the elementary rule is thoroughly well settled in California, and practically everywhere else, that a cause of action upon a contract arises, as soon as a breach of such contract occurs, unless the case falls within some exception specified by statute.

> "As a general rule, it is held a cause of action for a wrongful act, whether negligent or wilful, *or for the breach of a contract or duty, accrues immediately upon the happening of the wrongful act or the breach*, even though the actual damages resulting therefrom may not accrue until some time afterwards, and the statute, therefore, begins to run upon the occurrence of the act *or the breach* com-

plained of, and not from the time of the damage resulting therefrom." (Citing numerous cases.)

Middlekamp vs. Bessemer Irrigating Ditch Co., 103 Pac. Rep., 282.

Now in the case at bar, we submit. that it cannot be gainsaid that if the causes of action have accrued at all, they must have accrued long before the commencement of this action.

The action is brought upon a number of coupons representing installments of the principal and interest accruing upon the respective bonds to which they were were originally attached, Each of these coupons contains a flat, independent promise to pay contingent upon the performance of no condition whatever, other than the surrender of the coupon. The form of the installment principal coupon is as follows.

"$25.00. Rialto No. 1.
Irrigation District
will pay
to the bearer at the
Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on Jany. 1st, 1902, on surrender of this coupon the sum of
Twenty-five Dollars,
in U. S. Gold Coin, being 1st installment of Principal on bond of said district. Interest on said installment will cease after maturity.
D. ROBINSON,
Secretary.
No. 426.
Dated Nov. 17, 1890."

The form of interest coupon is as follows:

"$15.00. Rialto No. 9.
Irrigation District
will pay
to the bearer at the
Office of the Treasurer of said District at the Town of Rialto, County of San Bernardino, State of California, on July1st, 1895, on surrender of this coupon the sum of
Fifteen Dollars
in U. S. Gold Coin, being semi-annual interest on Bond No. 426.

D. ROBINSON,
Secretary.

Dated Nov. 17, 1890."

All of the coupons are of like tenor and effect, except as to the numbers, amounts and dates of maturity.

The bonds were also all of similar tenor and effect with the exception of the numbers, each bond being for the principal sum of $500.00, bearing interest at 6% per annum, payable semi-annually on the first day of January and July, and all being dated November 17th, 1890, the form thereof being as follows:

"Bond No. 426.
United States of America,
$500.00.
State of California.
$500.00.
Bond of the
Rialto Irrigation District.
Total issue $500.000.00.
Located in San Bernardino County, Cal.

For value received, the Rialto Irrigation District,

a public corporation, duly organized and existing under, and pursuant to the laws of the State of California, promises to pay to the bearer hereof, at the office of the treasurer of said district, the sum of ($500) five hundred dollars in gold coin of the United States, at the dates and upon installments as follows: at the expiration of eleven years from date, five (5) per cent. of said sum; at the expiration of twelve years from date, six (6) per cent. of said sum; at the expiration of thirteen years from date, seven (7) per cent. of said sum; at the expiration of fourteen years from date, eight (8) per per cent. of said sum; at the expiration of fifteen years from date, nine (9) per cent. of said sum; at the expiration of sixteen years from date, ten (10) per cent. of said sum; at the expiration of seventeen years from date, eleven (11) per cent. of said sum; at the expiration of eighteen years from date, thirteen (13) per cent. of said sum; at the expiration of nineteen years from date, fifteen (15) per cent. of said sum; at the expiration of the twentieth year from date, a percentage sufficient to pay off said sum in full.

Said installments are to be paid as provided in, and only upon the surrender of the respective installment coupons, hereto attached. And said district promises to pay interest on said principal at the rate of (6) six per cent. per annum, payable in gold coin of the United States at the office of the treasurer of said district semi-annually, on the first day of January and July, of each year upon the surrender of the respective interest coupons hereto attached. Both principal and interest are payable at par.

This bond is one of a series of bonds amounting in the aggregate to five hundred thousand dollars caused to be issued by the board of directors of said Rialto Irrigation District, and pursuant to a vote of the electors of said district at an election held for that purpose on the 15th day of November, 1890. The said series, of which this bond is one, is composed of one thousand bonds, each of the denomination of five hundred dollars, and said bonds are issued by authority of, pursuant to, and after a full compliance with all the requirements of the act of the legislature of the State of California, entitled "An act to provide for the organization and government of irrigation districts, and to provide for the acquisition of water and other property, and for the distribution of water thereby for irrigation purposes." Approved March 7, 1887, and the acts amendatory and supplementary thereto.

The Rialto Irrigation District is composed of citrus producing lands divided into ten and twenty acre farms, irrigated by one thousand (1000) inches of water measured under a four-inch pressure, piped to each farm lot. All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are, by said act of the legislature made a lien upon all said real property.

In witness whereof, said Rialto Irrigation District has caused these bonds to be issued and signed by its president and secretary, and its corporate seal to be hereunto affixed and the lithographed signature of its secretary to be affixed to each of said

coupons at the office of the board of directors in said district, this 17th day of November, A. D. 1890.

RIALTO IRRIGATION DISTRICT,

By A. B. FOWLER,
President of said Board.

By D. ROBINSON,
Secretary of said Board.

(Seal of Rialto Irrigation District.")

It cannot be denied that each of these coupons constitutes an independent and distinct obligation and that this is true, regardless of whether or no such coupons are severed from the bond, to which they were originally annexed, and therefore upon the non-payment of the amounts agreed to be paid on the respective dates specified in the coupons, *the right of action immediately became complete*. If this is not true, there is certainly no room for any argument to the effect that it became complete subsequently, for what has happened since the respective maturity dates of these coupons to render these causes of action thereon any more complete than they were upon such maturity dates? We reiterate, that if they did not then become complete, they are not complete now.

In Clark vs. Iowa City, 22 L. Ed., (U. S.,) 427, the United States Supreme Court said:

> "All statutes of limitation begin to run *when the right of action is complete*, and it would be exceptional and illogical to hold that the statute sleeps with respect to claims upon detached coupons, whilst a complete right of action upon such claims exists in the holder."

In Koshkonong vs. Burton, 26 L. Ed. (U. S.) 886,

where suit was brought on some municipal bonds and attached coupons, the same court said:

> "*None of the coupons have ever been detached* from the bonds nor paid, except those maturing July 1, 1857, and January 1, 1858. The coupons are all alike except as to dates of maturity. *They are complete instruments*, capable of sustaining seperate actions, without reference to the maturity or ownership of the bonds. * * * * * This action is barred as to all coupons maturing more than six years before its commencement, whether such coupons *were separated or not* from the bonds to which they were originally attached. This, upon the authority of Amy vs. Dubuque, 98 (U. S.) 470 (XXV., 228), with the doctrines of which we are entirely satisfisd. We there said, construing the statutes of Iowa, upon the subject of limitation, that suits upon unpaid coupons, such as those in suit, might be maintained in advance of the maturity of the principal debt; that 'Upon the non-payment at maturity of each coupon, the holder had a complete cause of action. In other words, he might have instituted his action to recover the amount thereof at their respective maturities. *From that date, therefore, the statute commenced to run against them.* Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when, by contract, he was entitled to demand payment could not prevent the statute from running."

So also, in Amyvs. Dubuque, 25 L. Ed., (U. S.) 228, the same court said:

> "The case of Clark vs. Iowa City, arose under the same statute of limitations which is invoked by

the City of Dubuque for its protection in this case. It is cited by counsel for plaintiff in error in support of the proposition that limitation, under the Iowa statute, does not commence to run against a coupon until it is detached from the bond. There are some expressions in the opinion in that case which, standing alone, would seem to sustain that construction of the statute. But it is quite obvious, from the whole opinion, that the conclusion reached, upon the point necessary to be decided, did not rest upon the isolated fact that the coupons sued on had become severed from the bond. It did rest mainly, upon the ground that the coupons sued on were specialties, *separate written contracts*, *capable of supporting actions after their maturity*, *without reference to the maturity or ownership of the bonds. We distinctly held in that case*, *that all statutes of limitation begin to run when the right of action is complete*. We said: "Every consideration, therefore, which gives efficacy to the statute of limitations, when applied to actions on the bonds after their maturity, equally requires that similar limitations should be applied to actions upon the coupons after their maturity.' Our answer to the specific question certified to us was, 'That the Statute of Iowa, which extends the same limitations to actions on all written contracts, sealed or unsealed, began to run against the coupons in suit *from their respective maturities*.' So far, then, from that case supporting the defense of the city, it is an express authority for the position that the limitation of ten years, prescribed by the Iowa statute, applies equally to bonds and their coupons. The only material respect in which this case differs from Clark vs.

Iowa City, is that the coupons in suit here have never been severed from the bonds, and are held by the same person who owns the bond, while in that case they were severed from bonds which had been previously paid off. But this difference cannot logically, or in view of the Iowa decisions, affect the construction of the statute under examination. The right of the plaintiff in error to sue upon the coupons *was complete after their non-payment at maturity*, whether they had been previously severed or not from the bond. Upon principle, his failure or neglect to detach the coupon and present it for payment at the time when by contract he was entitled to demand payment, could not prevent the statute from running from that date. Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit, from the time 'their causes accrue;' that is, from the time *the right to sue* for a breach attaches."

When it is recalled that as we have seen the California Code of Civil Procedure expressly provides that the statute applies to all cases *without exception*, except where the statute otherwise prescribes. (Sec. 312 C. C. P.), of course, it would be peculiarly illogical for the California courts to depart from the rule mentioned in the last three cases we have cited and the California Supreme Court is in accord with the rule and has repeatedly held that the statute applies to *all* actions.

In the case of Collins vs. Driscoll, 69 Cal., 552, the court said:

"The statute of limitations begins to run *when*

the right of action accrues, and never before. This is a general rule, and applies to *all* actions."

In the case of Jones vs. Nicholl, 82 Cal., 34, the court said:

"It is also a well-settled rule of law that the statute of limitations begins to run when a right of action accrues. This is a general rule, and applies to *all* actions"

In Cal. Safe etc. Co. vs. Sierra etc., Co., 158 Cal., 690, where bonds and coupons were sued upon, the California Supreme Court said:

"The coupons in question were in the usual form, each consisting of a simple promise to pay to bearer, at a given date and place, the sum of thirty dollars, being six months' interest on one of the bonds. In the absence of any provision to the contrary in the bonds, or in the instrument securing them, it is undoubtedly the general rule that such coupons are *independent obligations*, and that, at least when they have been detached from the bonds and transferred to others than the holders of the bonds, the statute of limitations begins to run from the time of their maturity. (Short on Law of Railway Bonds, Sec. 75; Jones on Corporation Bonds and Mortgages, Sec. 267; Amy vs. Dubuque, 98 U. S., 470; Clark vs. Iowa City, 20 Wall., 585; Koshkonong vs. Burton, 104 U. S., 668; Nash vs. El Dorado County, 24 Fed., 252; Huey vs. Macon Co., 35 Fed., 481; Galveston vs. Loonie, 54 Tex., 517; Threadgill vs. Commrs., 116 N. C., 616, (21 S. E., 425.) The appellant claims, however, that a different rule has been established in this State by the decision in Meyer vs. Porter, 65 Cal., 67, (2

Pac., 884), and the two companion cases of Roeding vs. Porter, (Cal.) 2 Pac., 888, and Haumeister vs. Porter, (Cal.) 3 Pac., 123, decided in the same month as the Meyer case, and based upon its authority alone. Meyer vs. Porter was an appeal from a judgment denying a writ of mandate to compel the treasurer of the city of Sacramento to pay certain coupons out of funds in his possession. The trial court had sustained a demurrer to the petition ot the writ. In the Supreme Court various objections to the granting of the relief sought were considered and overruled. The opinion concludes with these words: "and as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute.' There is no further discussion of the point, nor is there, in the report of the case, any showing of the facts upon which the bar of the statute was claimed to have arisen. We are not informed whether the coupons were independent obligations, negotiable, and enforceable, by others than holders of the bonds, nor whether, if so enforceable, a right of action had in fact accrued at such time as to make the bar of the statute applicable. Under these circumstances, we do not regard the isolated expression above quoted as binding this court to the doctrine that an action upon interest coupons is never barred by lapse of time until a right of action on the bond itself would be barred. On the contrary, *we are inclined to take the view* expressed by the United States Circuit Court of Appeals for the ninth circuit in Mather vs. City and County of San Francisco, 115 Fed., 37, 43, (52 C. C. A., 631,

639), where the following language was used in reference to the foregoing statement of this court in Meyer vs. Porter: "It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not understand the decision, although it is impossible, from the meagre statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted, it was intended only to affirm the well settled rule that in the application of the statute of of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties. City of Lexington vs. Butler, 14 Wall., 282." Although the distinction between specialties and writings not under seal had been abolished in this State, it is probable that the writer of the opinion in Meyer vs. Porter had in mind the rule just referred to. To this extent, it is quite true that "the coupons partake of the nature of the bonds to which they belong," and the question whether an action on the coupons is barred must accordingly be answered by reference to the statute prescribing the period of limitation for an action on the bonds. This was all that was decided in Lexington vs. Butler, 14 Wall.,

282, and City of Kenosha vs. Lamson, 9 Wall., 483, although the opinions of the Supreme Court of the United States in these cases contained expressions which, taken alone, might have been and, indeed, were by some interpreted to mean that an action on the coupons was not barred until anaction on the bonds would be. Such was not, however, the true meaning of the decisions, as is clearly pointed out in Clark vs. Iowa Cfty, 20 Wall., 585, and other cases. In view of all this, we think there is nothing in Meyer vs. Porter to prevent this court from applying the rule supported by reason, as well as by overwhelming authority, viz.: that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run *from the date of the maturity of the coupons.*"

In Angell on Limitations in section 42, it is said:

"In general, it may be said that it is a rule in courts of equity, as well as in courts of law, that the cause of action or suit arises when and *as soon as the party has a right to apply to the proper tribunals for relief.*"

The Supreme Court of Kansas upholds this elementary doctrine in McDaniel vs. Cherryvale, 136 Pac., 899, and says:

"It is settled that *whenever one person may sue another*, a cause of action has accrued, and the statute begins to run. 25 Cyc., 1066."

See also Griffin vs. Macon Co., 36 Fed., 855.

Authorities might be multiplied indefinitely which uphold the legal platitude that the commencement of the running of the statute synchronizes with the accrual

of the cause of action and it is patent that the rule is firmly imbedded in California jurisprudence and we respectfully submit that section 312, C. C. P., cannot be ignored without overturning the ancient and unquestionable doctrine that the transcendent and uncontrollable sovereign power of the legislature cannot be modified, controlled or nullified by the courts.

> "The power and jurisdiction of Parliament, says Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws."
>
> 1 Blackstone Com., 161.

It is axiomatic that, in the absence of constitutional objection, similar powers are vested in our legislature.

Lukens vs. Npe, 156 Cal., 498.

Notwithstanding it is clear that if the causes of action on the coupons in the case at bar have accrued at all they accrued—in accordance with all the authorities—upon the respective maturity dates of the coupons; notwithstanding the existence of section 312, C. C. P., which by its express terms, admits of no exception applicable here being made to its operation and squarely announces the elementary rule—old as the common law, and consistently upheld by the California courts—that the accrual of the right to sue and the running of the statute go hand in hand; notwithstanding that section 337, C. C. P., in unmistakable language clearly provides that "an action upon any contract, ob-

ligation or liability founded upon an instrument in writing" must be commenced within four years; notwithstanding that it is well settled that the federal courts will follow the decisions of the court of last resort of the State where the controversy arises, in construing the statute of limitations, and notwithstanding that a large number of these coupons matured more than four years before the commencement of this action, in spite of all these features of the case, the learned judge of the District Court rendered judgment in favor of the defendant in error, for the full amount of each and every coupon sued upon herein.

The theory of the learned court appears to have been that the case fell within what is sometimes called the "particular fund doctrine," which has been enunciated in such cases as Lincoln County vs. Luning, 33 L. Ed. (U. S.,) 766, and Robinson vs. Blaine County, 90 Fed., 63, and that consequently, the statute did not run for the reason that it was admitted that on the first day of January, 1895, and ever since that date the plaintiff in error failed to have sufficient funds with which to pay the coupons in question. (Tr., p. 52.) This leads us to an examination of this doctrine.

Particular Fund Doctrine.

Should we indulge the hypothesis that such a doctrine is ever applicable to a case arising in this State, it is apparent we submit, that it would involve inserting in our statute of limitations an exception to its operation, which exception is not specified therein; in fine, it would be attempting something which we have already

seen, the paramount authority of our legislature and our State Supreme Court say cannot be done. This is obvious because, as our legislature has clearly defined the *accrual of the cause of action* as the commencement of the period within which, *without any exception*, save such as the statute has prescribed, *all* actions must be commenced (sec. 312, C. C. P.,) and as our State Supreme Court has repeatedly reiterated this rule, and held that the statute does apply to *all* actions and that no power is vested in the courts to add exceptions to the statute, it necessarily follows that to say that in certain cases, not within the statutory exceptions, the statute will not run, amounts to nothing less than adding exceptions to the statute and ignoring both the mandate of the legislature and the decisions of our State court, and subverting the rule that the federal courts will be controlled by the State Supreme Court decisions on questions relating to the statute of limitations.

Owing to the plain language of Section 312, C. C. P., our opponent is therefore confronted with two alternatives—either to take the position that the causes of action here have not accrued, and consequently, the statute has not been set in motion, in which event this action was prematurely brought, and hence he cannot recover anything; or on the other hand, to adopt the starting attitude and legal solecism that, although it is idle to deny, he could have sued upon each coupon, as it matured, and hence, the cause of action was complete and *accrued* contemporaneously with such maturity, yet, in defiance of the perspicuous and mandatory terms of sec-

tion 312, he is entitled to divorce the operation of the statute from the accrual of the cause of action, which two things, our legislature and our State Supreme Court unite in declaring inseparable. To choose the latter horn of the dilemma, we submit, would only lead us into an intellectual fog, because it is the equivalent of asserting: (1) that the legislature did not mean to say what it has said in language which could not be plainer, and it also involves complete nullification of section 312 and the decisions of the State courts; (2) that the elementary principle of the concurrence of the running of the statute with the right to sue must be entirely overthrown, and (3) that the well settled doctrine that the federal courts will, on this subject, be guided by the decisions of the local courts is a myth.

To escape from such a palpable *reductio ad absurdum*, the defendant in error endeavored, in the court below, to establish the notion that these coupons were in reality payable *only* and *exclusively* from a particular fund and in his brief filed in that court, he said:—

> "Where a county warrant is made payable out of special fund no action *can be maintained until the fund out of which it is payable comes into existence*, and the statute does not begin to run until that time."
>
> Wetmore vs. Monona County, 73 Iowa, 88, (34 N. W., 751.)

After making this quotation he goes on to say:

> "Each of the bonds sued on herein contains a recital to the effect that it is one of a series issued by authority of and pursuant to the requirements of

the Wright Act, (title of the Wright Act being quoted in full in the bond,) and each bond contains a further recital, as follows:

"All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is and the said bonds are by said act of the legislature made a lien upon all of said real property."

This recital is of particular consequence upon the question of the payment out of a particular fund. The law under which the bonds were issued provides for the levy of an assessment to pay the same, *and the bond itself contains a recital to the effect that it is payable only out of the fund which is to be provided in a particular way for that purpose.* It amounts in effect, if not in terms, to a promise on the part of the district to pay the principal and interest of the bond at the dates therein mentioned, *provided the fund out of which the payment is to be made shall have been collected.*"

(Plaintiff's brief, pages 18-19, filed in District Court.)

In other words, it will be seen from these extracts from his brief, the defendant in error takes the position that the payment of these bonds is *conditioned upon the existence* of the so-called "particular fund" and he plants himself on the doctrine of Wetmore vs. Monana County (34 N. W., 751-Ia.) that *no action can be maintained* in the absence of such fund. When it is recalled that it was stipulated no fund has existed since January 1st, 1895, (Tr., p. 53) and hence the proviso and condition, contended for by the defendant in error, has not been complied with, it is difficult to see why defendant

in error, if his theory be correct, has not argued himself out of court. It certainly is apparent that he is insisting upon an absurd legal anomaly to assert in one breath that it is expressly stipulated in these bonds that they are ONLY payable from a certain fund and that the promise of payment contained in the bond is coupled with a proviso which makes payment conditional upon the fund having been first collected, and in the next breath to assert that he is entitled to a money judgment upon the bonds and that he has a complete cause of action, notwithstanding that upon his own admissions, neither the fund exists, nor has such condition precedent been performed.

In Wetmore vs. Monona Co., (Ia.,) 34 N. W., Rep. 751, the court said:

> "The warrant was made payable out of a special fund and the defendant *was not liable to action* on the warrant, until the fund out of which it was made payable came into existence."

In Travelers Ins. Co. vs. Denver, 18 Pac., 558, the Supreme Court of Colorado affirmed a judgment sustaining a demurrer in an action brought upon a warrant, payable out of a special fund because the complaint contained no allegation that there was money in such fund and said:

> "It seems to be well settled that in an action upon warrants drawn on a special fund, it is necessary for the plaintiff to allege that *there is money in that fund* to pay the same. Reeve vs. City of Oskkosh, 33 Wis., 477; Campbell vs. Polk Co., 49 Mo., 214; Board vs. Mason, 9 Ind., 97; 1 Dill. Mun.

Corp., Sec. 505; 1 Daniel, Neg. Inst., Sec. 433. The warrants contain a direction to the treasurer of the city to pay 'out of the 20th St. sewer fund', to the order of Joseph Williams, the sums in said warrants named. It is claimed by plaintiff in error that this direction to pay 'out of the 20th St. sewer fund' must be considered as descriptive of the purpose for which the warrants were drawn. We do not think the claim well founded."

In Forbes v. Board, etc., of Grand County, 47 Pac. 388, at p. 390, the Supreme Court of Colorado said:

"But no action can rightfully be brought upon such warrant *until the fund is so raised, or the same might have been, by the levy and collection* of the tax provided by the revenue law. Brewer vs. Otoe Co., supra. In other words, *no right of action accrues* on such warrant until it is made to appear that one of these conditions exists. Logically, therefore, the statute of limitations does not commence to run *until the happening of such contingency.*"

In the last mentioned case, the court held a demurrer was properly sustained because no cause of action was stated in the absence of any allegation showing existence of funds and the court also clearly upholds the doctrine that the accrual of the cause of action and the operation of the statute are contemporaneous.

In Section 433 of Daniels on Negotiable Instruments, it is said:

"Where a warrant or order is made payable out of a particular fund, it creates no *general* charge against the corporation, but *only against the fund* which is designated."

In Section 51 of Burroughs on Public Securities, it is said:

> "When warrants are drawn payable out of a particular fund, they create *no general liability* against the municipality, *upon which an action may be maintained* by the holder. The municipality in such cases is only liable for the proper administration of the fund, and when that is exhausted its liability to a holder ceases.
>
> "In Kingsbury vs. Pettis County, the warrant was payable out of 'the road and canal fund,' and had ceased to be available for the purposes of discharging the warrants, having been diverted from the county by legislative enactment. It was held that in order to make the county liable it must be shown that the county *had received the fund* and applied it to other uses than called for by the warrant. The diversion of the fund by the legislature created no liability on the general funds of the county."

In Argenti vs. City of San Francisco, 16 Cal., 256, the court says:

> "In reference to the warrants, the rights of the plaintiff stand upon a different footing. They are drawn upon a particular fund, and cannot, therefore be regarded either as bills of exchange or promissory notes. The designation of the fund was not intended as a mere direction to the treasurer, and such is not its legal effect. He had no discretion as to the mode or means of payment. He was required to pay from moneys belonging to the fund mentioned in the warrants, and *was not at liberty to resort to any other source for that purpose.*

The effect of the warrants must be controlled by the terms and conditions expressed upon their face, and these are too plain to admit of any doubt as to their construction. The failure to pay them did not alter their nature, or so change their legal effect as to render them the proper subjects of an action. The only remedy was an action upon the the original indebtedness, and in such an action it is possible that the warrants might have been used as evidence for the purpose of establishing the indebtedness. It is clear, however, that *no action can be maintained upon the warrants themselves.* * * * * The warrants by themselves *furnish no ground of recovery.* They are neither bills of exchange nor promissory notes; they are drawn against a particular fund, and are not payable absolutely but *only in case the designated fund is sufficient to meet them.*''

In 14 Enc. of Plead. and Practice, at page 531, it is said:

''Where an order is drawn payable out of certain funds to come into the hands of the acceptor, *it must be averred that such funds have come to his hands.*''

See also: Freehill vs. Chamberlain, 65 Cal., 603.

Winston vs. Spokane, 41 Pac. (Wash.), 888.

Faulkner vs. Seattle, 53 Pac. (Wash.), 365.

Dean vs. Walla Walla, 92 Pac. (Wash.), 895.

Brix vs. Catsop, 80 Pac. (Ore.), 650.

Rice vs. Porter, 16 N. J. L., 446.

Rolli vs. Sarell, 16 Eng. Com. Law, 422.

Redman vs. Chacey, 73 N. W., 1081.

Goodrich vs. Detroit, 12 Mich., 279.

Second National Bank of Lansing vs. Lansing, 25 Mich., 207.

Furthermore, section 15 of the Wright Irrigation Act, (Cal. statutes, 1887, page 36), distinctly provides that bonds issued thereunder "shall be *negotiable in form*," and it is not debatable that no such thing can exist as a negotiable instrument which is payable solely from a particular fund.

In section 3088 of the Civil Code of California, it is provided:

> "A negotiable instrument must be made payable in money only and without any condition not certain of fulfillment, except that it may provide for the payment of attorney's fees and costs of suit, in case suit be brought thereon to compel the payment thereof."

In section 107, in Randolph on Commercial Paper, it is said:

> "As we have seen, the commercial character of an instrument depends upon its being a contract for unconditional payment. From this follows the rule that *it must not be made payable out of any particular fund*, and if made so payable, its negotiability is destroyed thereby."

In section 50 in Daniel on Negotiable Instruments, it is said:

> ' In accordance with these principles, the character of the instrument as a bill or note is destroyed if it be made payable expressly or by implication *out of a particular fund*, for its payment becomes then conditioned on the sufficiency of that fund, which may prove inadequate."

In 4 Am. and Eng. Enc. of Law (2nd Ed.), page 87, it is said:

> "Instruments drawn upon a particular fund, whether the fund has already accrued or is to accrue in future, *are not negotiable* bills or notes, since they do not carry the general personal credit of the maker and since they are contingent upon the sufficiency of the fund on which they are drawn."

If it be true that these bonds do contain the implied proviso, contended for by our opponent, and are payable *only* from a particular fund, it necessarily follows that they are non-negotiable and therefore fail to conform to the mandatory terms of the enabling act under which they purport to have been issued and are thereby rendered void.

In section 42 of the Wright Act, (Cal. Statutes, 1887, p. 44, it is provided that:—

> "The board of directors, or other officers of the district, *shall have no power* to incur any debt or liability whatever, either by issuing bonds, or otherwise, *in excess of the express provisions* of this Act, and any debt or liability incurred, in excess of such express provisions, *shall be and remain absolutely void.*"

This last quoted section, we submit, unquestionably makes the provisions of the act concerning the issuance of the bonds, *mandatory*, as it is provided in that section that the consequence of non-compliance with its terms renders the attempted incurring of liability by the irrigation district *absolutely void*, and the section seems

to have been drawn with reference to the well settled distinction between a mandatory and a directory statute.

> "A statute is mandatory when non-compliance therewith will render the act done under it *absolutely void.*
>
> "Directory.—If a statute is such that disregard of its provisions will constitute an irregularity, but one not necessarily fatal to acts done or proceedings had thereunder, it is said to be directory."
>
> 26 Am. and Eng Enc. of L., (2nd Ed.,) p. 533.

We respectfully submit that section 42 means just what it says, and that the legislature—well knowing that the class of men who would in all probability, in rural communities, act as directors of irrigation districts, would be men inexperienced in business, legal and financial matters—wisely provided that the powers of irrigation district directors should be confined within specific channels and hedged about with insuperable limitations, thereby preventing such communities from being subjected to stupendous liabilities by reason of ill advised steps of such directors.

> "It may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by statute upon corporations or individuals, the acts conferring such powers are to be construed strictly and the powers cannot be exercised for any collateral purpose."
>
> 26 Am. and Eng. Enc. of Law, (2nd Ed.,) p. 665.
>
> See also: Hughson vs. Crane, 115 Cal., 404.
>
> Stimson vs. Allessandro Irrig. Dist., 135 Cal., 389.

Sutro vs. Petit, 74 Cal., 332.

Leeman vs. Perris Irrig. Dist., 140 Cal., 540.

In the light of these precedents, and indulging the theory of defendant in error that these bonds are payable only from a particular fund, it is not easy to see how the defendant in error can consistently maintain that he is entitled to any judgment on a single coupon in this case. Nevertheless, in order to find foundation for his argument, that the statute has not been set in motion here, it is essential—unless logic be thrown to the winds and our local statutes of limitation and decisions be also cast into the melting pot—to maintain that his causes of action on these coupons have not accrued, otherwise, he would be confronted with the unavoidable consequences which section 312 of our Code of Civil Procedure so emphatically prescribes shall result *after a cause of action accrues*, and he would then be driven to attempting the impossible. In other words, in such event, he would have then to vindicate his hypothesis of ascribing to causes of action, based on these coupons, the attribute of immortality, by virtually repealing section 312, and by overruling the decisions of our State Supreme Court, and by obliterating the fundamental principle which makes the running of the statute an indispensable accompaniment of the right to sue, unless it is otherwise prescribed by statute.

However, the attitude of defendant in error—in insisting that these coupons are only payable from a special fund and that they import a condition that money shall first be in the fund before the promise to pay becomes

operative—is equally as untenable as would be the other alternative we have mentioned, with which he is faced, and no support for the notion that this case is exempted from the operation of the statute, because the cause of action has not accrued, can be derived from an examination of the bond or coupon.

In the first place, we have seen that each coupon contains a flat promise to pay on surrender of the coupon, and constitutes a *separate and independent cause of action*.

The assertion of defendant in error, that "the bond itself contains a recital to the effect that it is payable *only* out of the fund which is to be provided," cannot be substantiated. The word "only" does not appear in the recital at all and with that word eliminated there remains no vestige of any color for the theory of our opponent.

The bond does recite (Tr., p. 22,) that:

> "All the said bonds and the interest thereon are to be paid by revenue derived from an annual tax upon the real property of the district, which tax is, and the said bonds are by said act of the legislature made a lien upon all said real property."

Furthermore, the Wright Act (Cal. Stat., 1887, p. 36), contains the following provisions:

> "Sec. 15 * * * * "If a majority of the votes cast are "Bonds——Yes", the Board of Directors shall immediately cause bonds in said amount to be issued; said bonds shall be payable in gold coin of the United States, in installments as follows, to-wit: At the expiration of

eleven years not less than five per cent of said bonds; at the expiration of twelve years not less than six per cent; at the expiration of thirteen years not less than seven per cent; at the expiration of fourteen years not less than eight per cent; at the expiration of fifteen years not less than nine per cent; at the expiration of sixteen years not less than ten per cent; at the expiration of seventeen years not less than eleven per cent; at the expiration of eighteen years not less than thirteen per cent; at the expiration of nineteen years not less than fifteen per cent and for the twentieth year a percentage sufficient to pay off said bonds; and shall bear interest at the rate of six per cent per annum, payable semi-annually on the first day of January and July of each year. The principal and interest shall be payable at the office of the Treasurer of the district. Said bonds shall be each of the denomination of not less than one hundred dollars, nor more than five hundred dollars, *shall be negotiable* in form, signed by the president and secretary, and the seal of the board of directors shall be affixed thereto. They shall be numbered consecutively as issued, and *bear date at the time of their issue*. Coupons for the interest shall be attached to each bond signed by the secretary. Said bonds shall express on their face that they were issued by authority of this Act, stating its title and date of approval. The secretary shall keep a record of the bonds sold, their number, the date of sale, the price received, and the name of the purchaser.

Sec. 16. The Board may sell said bonds from time to time, in such quantities as may be necessary and most advantageous, to raise money for the

construction of said canals and works, the acquisition of said property and rights and otherwise to fully carry out the objects and purposes of this Act. Before making any sale the Board shall, at a meeting, by resolution, declare its intention to sell a specified amount of the bonds, and the day and hour and place of such sale, and shall cause such resolution to be entered in the minutes, and notice of the sale to be given, by publication thereof at least twenty days, in a daily newspaper published in the cities of San Francisco, Sacramento, and Los Angeles, and in any other newspaper, at their discretion. The notice shall state that sealed proposals will be received by the Board, at their office, for the purchase of the bonds, till the day and hour named in the resolution. At the time appointed the Board shall open the proposals, and award the purchase of the bonds to the highest responsible bidder, and may reject all bids; but said Board shall in no event sell any of the said bonds *for less than ninety per cent* of the face value thereof.

Sec. 17. Said bonds, and the interest thereon, shall be paid by revenue derived from an annual assessment upon the real property of the district; and all the real property in the district shall be and remain liable to be assessed for such payments as hereinafter provided." * * * *

Sec. 34. Upon the presentation of the coupons due to the treasurer, he shall pay the same *from said Bond Fund.*"

Section 22 of the Wright Act, as amended in 1889, (Cal. Statutes 1889, p. 16) is as follows:

"Section 22. The Board of Directors shall then levy an assessment sufficient to raise the annual in-

terest on the outstanding bonds; and at the expiration of ten years after the issuing of bonds by the Board, must increase said assessment for the ensuing ten years in the following percentage of the principal of the whole amount of bonds then outstanding; to-wit: For the eleventh year, five per cent; for the twelfth year, six per cent; for the thirteenth year, seven per cent; for the fourteenth year, eight per cent; for the fifteenth year, nine per cent; for the sixteenth year, ten per cent; for the seventeenth year, eleven per cent; for the eighteenth year, thirteen per cent; for the nineteenth year, fifteen per cent, and for the twentieth year, a percentage sufficient to pay off said bonds. The secretary of the board must compute and enter in a separate column of the assessment book the respective sums in dollars and cents to be paid as an assessment on the property therein enumerated. When collected the assessment shall be paid into the district treasury, and shall constitute a special fund, to be called the 'Bond Fund of ..... Irrigation District.' In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made, as in this Act provided, then the assessment of property made by the county assessor and the State Board of Equalization shall be adopted and shall be the basis of assessments for the district, and the board of supervisors of the county in which the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this Act in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto

> shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated must respectively perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

It is apparent from these quotations that neither the bonds nor the statute contain any language which limits the sources of payment for the bonds or coupons *exclusively* from any particular fund. There is no provision to the effect that these bonds or coupons shall be paid *only* from any special fund. It is true the act provides a special fund shall be raised by assessment which shall constitute a special fund, to be called the "Bond Fund" and *upon the presentation of the coupons due* to the treasurer, he shall pay the same from said Bond Fund. Even if these provisions could be construed as a limitation upon the purposes to which this fund can be devoted, the converse would not be true. There is a manifest distinction between making an obligation payable *only* from a particular fund and making a fund applicable *only* to the payment of such obligation. Because a given fund can be used to pay only certain bonds is no reason for claiming such bonds are payable solely from such fund. (Kimball vs. Commissionsrs, 21 Fed., 145.)

It is also interesting to note that the Act, approved by the Legislature on March 31st, 1897, covering the government of irrigation districts (Cal. Statutes 1897,

p., 267) omits the provisions of the original Wright Act, which refer to the raising of any special bond fund and the payment of bonds therefrom.

With these principles in mind, the conclusion is unavoidable that the bonds and coupons in question constitute *general* obligations of the irrigation district, and are clearly distinguishable from that class of obligations which are payable *only* from a particular fund and from no other source, upon which latter class, no cause of action for a money judgment can arise until the fund from which they are payable comes into existence. Our conclusion is thoroughly well supported by reason and authority and we submit it is impossible to see how instruments, containing as these do, flat agreements to pay specific sums of money, on certain dates, upon surrender of the coupons, can be distorted into obligations payable *exclusively and only and solely* from a particular fund, simply because it is recited in the bonds that they will be paid by revenue derived from taxation, which is the only source of payment of all municipalities.

The case of Schoenhoft vs. Kearney Co., (Kas.,) 92 Pac., 1097, is an instructive case upon this subject. There, the plaintiff sued for interest on bonds evidenced by coupons which were similar in form to the coupons involved here. The defendant pleaded the statute of limitations, to avoid the effect of which the plaintiff showed that no funds had been available for paying the coupons since their maturity and that no levy of any taxes had been made for providing funds. The Supreme Court of Kansas in its opinion, points out that although

the so-called particular fund doctrine has been applied to suits on warrants in Kansas, yet such warrants are merely drafts on anticipated revenue and do not generally mature before the money to meet them is received into the specific fund upon which they are drawn; but coupons are different and "are *general* promises to pay upon a certain day"; *hence*, *the statute runs from maturity of such coupons*. After distinguishing various cases, cited to support the "particular fund doctrine" and showing the inapplicability of such doctrine to general obligations, such as coupons, the court then disposes of the theory that taxes constitute a particular fund and says:

> "Taxes are the primary source of municipal revenue, and money accumulated entirely from taxes with which to meet a general obligation to pay *cannot be said to be a particular fund* in the sense of the decision, nor can it be said that taxation, the chief method of raising municipal revenue, *is a special or particular method*. No other authority cited by the plaintiff supports his argument, and this court is unwilling to extend the exceptional rules relating to the treasury warrants of a municipality to its bonded indebtedness."

We respectfully submit that, in a state with such statutes of limitations as ours, if the so-called "particular fund doctrine" is to justify any logical or legal distinction between a class of cases in which the plea of the statute of limitations is to be upheld, and another class in which such plea is to be held improper, that doctrine must be held to mean that the obligation, so payable

from the particular fund, is *exclusively* so payable. So construing the doctrine, it becomes perfectly sound and logical, because where the payment is so confined to such fund, a cause of action for a money judgment, on the obligation, will not accrue in the absence of such fund, and hence, the statute will not commence to run. On the other hand, if such payment is merely designated to be made from a fund—either for the convenience of the fiscal management of the municipality, or to comply with some statutory provisions—and the agreement of the municipality to pay is not in express terms *confined to the particular fund*, then such agreement is the equivalent of a *general* promise to pay and the cause of action consequently accrues upon the maturity date of each coupon of such a bond or obligation and the statute concurrently commences to run, in harmony with the provisions of Section 312 of our Code of Civil Procedure and with the decisions of our State Supreme Court, in which case, no elementary and well-settled principles are uprooted, and no legislative enactments are obliterated.

That the Irrigaion District here made no pretense of confining in express terms the payment of these bonds, to any particular fund is absolutely undeniable. If the reference in the bonds to the fact that taxation is the source of revenue, from which the bonds would be paid, could be held to be the equivalent of confining the payment to a particular fund, then every municipal bond in the country would be subject to the particular fund doctrine as, of course, taxation is the universal source from

which all municipalities pay their obligations, and such a decision would constitute a precedent without a precedent. As the Irrigation District failed to expressly restrict the payment of these bonds to any particular fund, it is not permissible to imply such a restriction and thereby convert the primary and general liability of the district into a circumscribed and special liability.

The case of U. S. vs. Clark County, 96 U. S., 211, 24 L. Ed. 628, was a suit upon railway aid bonds issued by the county. By the act authorizing the bonds, a special tax was to be levied for the payment of the bonds. It was contended by the county that the bondholder must look alone to the particular fund provided by the special tax for the payment of the bonds, but the Court said:

> "There is no provision in the act that the proceeds of the special tax alone shall be applied to the payment of the bonds. None is expressed, and none, we think, can fairly be implied. It is no uncommon thing in legislation to provide a particular fund as additional security for the payment of a debt. It has often been done by the States, and more than once by the Federal Government. The Act of Congress of February 25, 1862, 12 Stat. at L., 346, set apart the coin paid for duties on imported goods as a special fund for the payment of interest on the public debt and for the purchase of one per centum thereof for a sinking fund; yet no one ever thought the obligation to pay the debt is limited by the amount of the duties collected. Limitations upon a special fund provided to aid in the payment of a debt *are in no sense restrictions of the*

liability of the debtor. Why, then, must not the special tax of one twentieth of one per cent. be regarded as merely an additional provision made for the payment of the new debt authorized, rather than as a denial to the creditors of any resort to the ordinary sources from which payment of county debts is to be made? Why should such a provision be construed as placing the holders of the bonds in a worse situation than that of other creditors of the county? These bonds are a debt of the county as fully as is any other liability. Had the act which gave power to the county to issue them said nothing of any special tax, there could be no question that the holders of the bonds, like other creditors, would have a resort to the money in the county treasury collected for the discharge of its obligations; for it is by the law made the duty of the county court to order the payment out of the county treasury of any sum of money found by them to be due from the county. It would, therefore, have been the court's duty to direct its clerk to issue a warrant for payment, as in other cases. And surely it is not to be held, unless such a construction of the statute is absolutely necessary, that when the legislature authorized the county to incur the debt, it intended to deny to the creditor the right to look to the treasury of the county for its payment; in other words, that the debt was sanctioned, but that it was stripped of the usual incidents of a debt, and the debtor was relieved from attendant liabilities. *And it is not to be inferred, from a provision giving the creditor the benefit of a special fund, that it was intended to place him in a worse position than that he would have occupied had*

no such provision been made. And that, too, in absence of any direction that he must look exclusively to that fund. Such is not a reasonable construction of the statute."

We submit that the last ~~question~~ quotation rules the case at bar and clearly shows that when a special fund is to be created by taxation, no restriction is thereby placed upon the liability of the debtor but, on the contrary, the debtor is *generally* liable and the special fund is to be deemed simply an additional security for the payment of the debt. Applying these principles to the bonds and coupons here, how is it possible for an instant to maintain that, when it is said in the bonds that the district "promises to pay to the bearer," a specific sum of money in installments (Tr., p. 7), and when "said installments are to be paid as provided in," the respective coupons (Tr., p. 8), and when it is said in the coupons that the district "will pay to the bearer" a specific sum (Tr., p. 10), that the holder of such coupons or bonds has no right to sue on such bonds or coupons for a money judgment, unless money is in the fund in question? Can it be for a moment denied that credit was given by the bondholder *to the district itself*, when these bonds were issued, and that such bondholder did not accept or contemplate any contingent liability, on the part of the district, dependent upon the presence or absence of cash in the bond fund, or agree to look alone to any fund and not to the district for payment?

"To determine whether the money is payable out of a particular fund, we are to inquire whether the

credit is given to the fund in question, or to the person of the drawer or accepter of the bill."

Rice vs. Porter's Admrs., 16 N. J. L., page 447.

Referring to negotiable paper, Chancellor Kent, in 3 Kent's Com., p. 76, says:

"It is essential that the bill carry with *it a personal credit*, given to the drawer or indorser, and that it be not confined to credit upon any future or contingent event *or fund*. The payment must not rest upon any contingency, except the failure of the general personal credit of the person drawing or negotiating the instrument."

In Avery vs. Job., 36 Pac., 293 (Ore.), a municipal charter provided that:

"All moneys collected from water rates shall be kept separate from all other funds, and shall be known as the 'water fund, and shall *only* be used to pay the costs incurred by the city in operating such waterworks, and extending and improving the same, and to pay the semi-annual interest on the bonds issued under this act; and all the surplus collected from water rates shall go to create a sinking fund with which to pay the principal of such bonds at maturity."

The Oregon court said:

"The argument is that by this provision of the charter the money collected for water rates is made a special fund for the payment of the interest on the bonds as it accrues, and for the creation of a sinking fund for their payment at maturity, and that it is *the only fund* out of which said bonds, or the interest thereon can be paid. As a general rule, when the legislature authorizes a munici-

pality to contract a debt, and issue bonds therefor, it is to be inferred that it intended to authorize the payment of such bonds out of the money raised by general taxation, unless there is something in the act itself, or some general limitation upon the power of taxation, which repels such an inference, and, *although a special tax or fund may be provided, the bondholders' remedy is not limited to such tax or fund, unless it is provided that the bonds shall not be paid in any other way.* The bonds, when issued, become a debt of the corporation for which *it is primarily liable*, and for any balance due thereon after the application of the special fund, the holders are entitled to payment out of the general fund of the corporation."

In Mutual Benefit Ins. Co. vs. City of Elizabeth, 42 N. J. Law, 235, the syllabus, (paragraph 2) reads:

"A bond given by a city containing a general obligation to pay cannot, except upon the plainest grounds of construction, *be converted in toa promise to pay out of a particular fund.*"

On page 242 of the opinion, the court said:

"Nor do I find in any of the provisions of the laws appertaining to this city, anything from which such a circumscription of this contract can be effected by implication. The law which authorizes the issuing of these instruments contains no intimation that they are not to be instruments imposing a *general* obligation to pay the money mentioned in them. They are the bonds of the city, and such bonds do not have the effect of imposing only a partial obligation. Nor does the fact that the city has a sinking fund devoted specially to the payment of these bonds as they mature, give rise

to such an intendment. Such a contrivance was doubtless designed to put the city in funds to meet these debts as they fell due, *but how such an expectation is to have the effect of converting a general engagement to pay into a particular engagement to pay only out of such fund, is not apparent.* The alteration of the contract from the unrestricted form of its expressed terms to the limited form insisted on, is so material and fundamental, that nothing but the plainest exhibition of a legislative purpose to so circumscribe the operation of these contracts, should be permitted to control them in this particular. If the promise of the city was intended to be a qualified one, it was an easy thing for the legislature to have so declared.

See also Morrison vs. Bernards, 36 N. J. Law, 219.

Commonwealth vs. Select. etc. of Pittsburg, 88 Pa., 66 at page 83 *et seq.*

Macon Co. vs. Huidekoper, 99 U. S., 592, 25 L. Ed., 333 (Note).

Knox Co. Ct. vs. U. S., 109 U. S., 229, 27 L. Ed., 915.

U. S. vs. Macon Co., 99 U. S., 582.

Backus vs. City of Virginia (Minn. 1913) 142 N. W., 1042.

Loan Association vs. Topeka, 22 L. Ed. (U. S.), 455.

In United States vs. Scott, 25 L. Ed. (U. S.), 349, the court said:

"But, in behalf of the city, it is urged that the holder of these bonds must, by the terms of the

statute, and the ordinance of January 22, 1872, look for payment exclusively to assessments upon the property specially improved and benefited. It is contended that such was the purpose of the city, of which the purchaser had constructive notice in the reference, in the marginal statement upon the bonds, both to sections 16 and 17 of the Act of March 2, 1871, and to the ordinance passed by the council. To that interpretation of the contract we cannot yield our assent. It is true that section 17 declares that 'For the payment of said bonds' assessments shall be made 'Upon the taxable property chargeable therewith;' that is, 'on all lots and pieces of ground to the center of the block, extending along the street or avenue, and distance improved.' *But it is neither expressly nor by necessary implication provided that the holder of the bonds may not be paid in some other mode*, or that the city will not, under the authority derived from other sections of the statute, comply with its promise to pay the bonds, with interest, at maturity.''

In Vickey vs. Sioux City, 115 Fed., 440, the circumstances were very similar to the case at bar, only in the former case, it seems to have been provided that the special fund should be used *only* for the payment of certain bonds, which is not the case here. We have already pointed out the conspicuous distinction existing between an obligation which is payable *only* from a special fund and a special fund which can be used *only* for paying a certain obligation—the former arrangement causing the obligation to fall within the special fund doctrine and thereby rendering the existence of the fund a *sine qua non* be-

fore a cause of action for a money judgment on the instrument can arise, and also necessarily resulting in the statute of limitations being held in abeyance until such fund is provided; while, on the other hand, where the instruments are *general* obligations and the act simply provides that the fund in question shall be used solely for paying such obligations, an entirely different state of affairs exists and the cause of action accrues upon maturity of the obligation. In the Vickey case, the court said:

> "There is not to be found, either in the Act of the 20th General Assembly, or in the ordinance of the city based thereon, or in the terms of the bonds, any declaration to the effect that the bondholder can look *only* to the fund realized from the special assessment for the payment of the bonds, and *the express promise to pay*, on the part of the city, which is set forth in the bond, *cannot be limited* by the inferences sought to be drawn from the fact that the act of the legislature provided for the creation of a sinking fund, consisting of the funds derived from special assessment, to be used *only* for the payment of the cost of the improvements, including the bonds issued to meet the cost."

In U. S. vs. Saunders, 124 Fed. Reps., 131, it is said in the syllabus:

> "District bonds of a city, issued to pay for internal improvements, which contain no stipulation limiting the recourse of their holders to the special taxes levied for such improvements create a *general* liability of the city issuing them, and their officers are authorized and required to levy and collect taxes

upon all the taxable property within the limits of the city."

See also State vs. Commissioners, 37 Ohio St., 526.

Wyandotte vs. Zeilz, 21 Kan., 467.

Hitchcock vs. Galveston, 96 U. S., 341, 24 L. Ed., 659.

Kimball vs. Board of Commissioners, 21 Fed., 145.

Eaton vs. Minnaugh, 73 Pac., (Ore.,) 754.

In the case of Kimball vs. Board of Commissioners, 21 Fed., 145, the Court said:

"It cannot be said to be true in fact that the bonds are payable solely from the proceeds of the special assessments, unless an inference to that effect must be drawn from the requirement that the assessment be made, and that the money derived therefrom shall be applied to no other purpose. But this inference, as it seems to me, in the light of the whole statute, is neither necessary nor admissible. While the special fund is provided, which may be used for no other purpose, *it is not declared that no other fund may not be used for the same purpose*."

See also Brokenbraugh vs. Board, etc., of Charlotte, (N. C.,) 46 S. E. 28-30.

State vs. Mayor, etc., Neosho, (Mo.,) 101 S. W. 99-110.

City of Springfield vs. Edwards, 84 Ill., 626-633.

Swanson vs. City of Ottumwa, (Ia.,) 91 N. W., 1048.

Fowler vs. City of Superior, 54 N. W., 800-803.

Olmstead vs. City of Superior, 155 Fed., 172-179.

Note 37 L. R. A., (N. S.,) 1070.

In Herring vs. Modesto Irr. Dist., 95 Fed., 705-709, (an action upon coupons attached to bonds of an irrigation district, which action was brought in the United States Circuit Court of California) the Court said:

> "The action is at law to recover a money judgment on each of the coupons mentioned in the complaint, that has become due and payable under the provisions of the statute and the terms of the contract contained in the bonds. The fact that these coupons are to be paid out of a fund to be raised by the officers of the district in a specified manner does not impose upon the plaintiff the necessity of alleging that these officers have failed to perform their duty. The suit is not upon an order or warrant issued by a municipal officer, but upon a *corporate promise to pay*, with respect to which there has been a default. In Travelers' Ins. Co., vs. City of Denver (Colo., Sup.,) 18 Pac. 556, 558; Reeve vs. City of Oshkosh, 33 Wis., 477; Campbell vs. Polk Co., 49 Mo., 214; Board vs. Mason, 9 Ind., 97; Cloud vs. Town of Sumas, (Wash.,) 37 Pac., 305; Aylesworth, vs. Gratiot Co., 43 Fed., 350, the actions were all founded upon the failure of a municipal officer to pay an order or warrant drawn by another officer of the corporation. *The present cause of action is based upon the failure of the defendant to pay a certain sum of money at a time and place specified in its contract. For this default the plaintiff is entitled to maintain this ac-*

tion. And it is immaterial, in determining the sufficiency of the complaint, to consider how the judgment in the suit may be enforced."

From the foregoing cases it clearly appears that neither the bonds nor coupons in the case at bar are payable *solely* from any particular fund, but constitute *general* obligations of the district which may be sued upon *as soon as they severally mature.* This being the case, with the imperative terms of Section 312 of our Code of Civil Procedure before us, fortified by the elementary rule that the courts cannot add exceptions omitted by the legislature, and buttressed by numerous decisions of our State Supreme Court holding that our statute of limitations applies *to all cases without any exception unspecified by the legislature*, it is very plain we respectfully submit, that the statute of limitations has run against all af these coupons which matured four years or more before the commencement of this action. The only escape from such a conclusion would be to show that Section 312 of the Code is not operative, upon the theory that the causes of action *have not accrued* on these simple and unreserved promises to pay specific sums at precise dates upon surrender of the coupons, notwithstanding the admitted breach of each of such promises. The fallacy of considering such a theory being of any assistance to the defendant in error arises from the fact that it can only be supported by reasoning *felo de se* in character, which reasoning necessarily embraces the preposterous notions (a) that, notwithstanding the decisions to the contrary, these coupons are payable *exclusively* from a particular fund and fix no gen-

eral liability on the district; (b) that the language of these coupons is tantamount to the incorporation of an express proviso in the coupons to the effect that they are payable from *no other source* or fund, and (c) that as there is no money in the fund no cause of action for a money judgment has yet accrued and consequently, Sec. 312 is inapplicable.

We reiterate, if it be true that the cause of action has not accrued, why is defendant in error here?

Whatever reply he may make to this query, it still remains true that with the exceptien of this decision of the District Court, brought now to this court for review, not a single solitary decision can be found—where the statute of limitations was pleaded in an action on bonds of this character, in a jurisdiction with a statute of limitations similar to section 312, C. C. P., and which statute has been brought to the attention of the court—which upholds the novel doctrine that the statute is not a complete defense to such instruments which have matured four years before the commencement of the action. It is true we may be unable at present to cite any decision of our State Supreme Court on this subject where irrigation district bonds were involved, but we shall be able to cite precedents of that court, involving bonds of other public corporations of practically identical import as the bonds here. It may also be of interest to note that Judge B. F. Bledsoe (now one of the judges of the U. S. District Court for the southern division of California), while judge of the San Bernardino County Superior Court, in the case of A. M. Ham vs. Grapeland

Irrigation District, recently held that the statute does run against irrigation district bonds. Judge F. F. Oster, of the same Superior Court, lately announced the same doctrine, while trying the case of Arthur Young vs. Allesandro Irrigation District in the Superior Court of Riverside County, California, and Judge F. E. Densmore of the Riverside County Superior Court, likewise so held in the case of James Patterson vs. Perris Irrigation District. The Ham case was not appealed by the plaintiff therein; the Young case was settled for a very small consideration, and the Patterson case was also not appealed by the plaintiff therein.

The far sweeping reach of this decision of the District Court arises from the fact that bonds of irrigation districts, all over Southern California, and from Fresno to San Diego, have been issued in stupendous amounts. These numerous districts have all proved dismal failures, the financial history of which districts is a matter of which the courts will take judicial notice.

Hughson vs. Crane, 115 Cal., 404.

When it is recalled that many years ago the country was and still is flooded with such paper, and that the principal sums and accumulated interest, evidenced by such paper now extant, run up into many millions of dollars; that nearly all of such issues of bonds were acquired by the present holders or their predecessors in interest, at a tremendous discount for purposes of speculation; that such holders, after a period of slumbrous tranquility; during which it generally transpires, more than twenty years have elapsed, as most of these bond issues

were made shortly after the enactment of the Wright Act in 1887—come forward and assert their belated claims to the full limit of principal and accumulated interest, because "it is denominated in the bond," regardless of the fact that the paper was acquired by them for a few cents upon the dollar; that such claims will be charged against a vast acreage embraced within numerous irrigation districts, situate all over this State, the present land owners of which districts, it is proposed shall be held responsible for the mistakes and negligence of men —generally untrained in business affairs—who have long since ceased to hold office in such districts, and who, from lack of knowledge of the law, permitted such bonds to be issued; that such land owners will often find themselves without available defense to meet the legal presumptions of the legality of such bonds, because, owing to the great lapse of time, witnesses to the facts, constituting the infirmities of the paper, have long since scattered or died; that during the many years holders of such bonds have refrained from pressing their claims, valuable property rights have been acquired by numerous land owners, and vast expenditures made in the districts, under the general impression, prevailing in southern California, that such bonds were non-enforceable, and by the long inaction of such bondholders, scores of investors in lands. within the zones affected by such bonds, have been lulled into the belief that such stale claims never would be pressed; such conditions, certainly, we submit, make the question one of most vital and far reaching importance.

The multitude of settlers in these districts, who have "borne the heat and the burden of the day," if this decision stands, will now be confronted with an enormous indebtedness respecting which nearly all of them had nothing to do. Before this burden should be fastened upon the generation which has grown up since these bonds were issued; before the homes of many of these people are practically ruined by the blighting effect of imposing thereon a bonded debt, now here claimed to be immortal, but long since supposed by the public in these districts, to have fallen into a state of "innocuous desuetude;" before the countless bonds of other irrigation districts—which bonds have in times past been purchased by speculators for a song and have lain unenforced for a long period of years because their owners deemed them unenforceable—emerge from their dusty receptacles and are sued upon with accumulated interest; before such things happen upon the strength of this decision of the District Court, we respectfully submit (1) that the language of Section 312, C. C. P., should be entitled to the weight which arises from such plain and unmistakable words; (2) that the heretofore unquestioned construction placed by our State Supreme Court on the statute of limitations should be followed by this court in accordance with the rule of the federal courts; (3) that there is nothing in the case at bar which justifies the anomalous doctrine that the right to sue for a money judgment herein became complete long years ago without at the same time starting the running of the statute, which novel reasoning can lead nowhere but

into a mental *cul de sac* and obviously results in the stultification of all logical principles enunciated so repeatedly by the courts when discussing the statute of limitations.

The situation here is somewhat akin to that presented in S. F. Savings Union vs. Reclamation District, 144 Cal., 649, where, in referring to the proper construction to be placed upon a statute, the California Supreme Court said:

> "It would be an impossible construction of the amendment of 1899 to hold that it not only gives the right to maintain an action against the district upon these stale claims, but also revives the right to maintain the suit for a writ of mandate to compel an assessment which had been previously barred by the statute of limitations. Such a construction could never be based upon implication merely, but would require express and distinct words to that effect. It must be presumed that if the legislature had intended such results it would have expressed its meaning in terms fitly appropriate to describe a proposition so remarkable and unusual. Moreover, such construction would undoubtedly be productive of injustice and oppression. *For many years these claims had been considered as outlawed. The owners of land within the district have no doubt considered their property free from any liability on account of the burden of these debts. During this period numerous transactions must have been made upon the belief that no such burden existed.* There is nothing to indicate that the legislature intended to re-establish this burden and thus disturb long-settled conditions."

So also this court in the case of Eddy vs. San Francisco, 162 Fed., 441, adopted views similar to the State Supreme Court, in a suit brought on stale claims founded on bonds, and referring to whether equitable relief was applicable, said:

> "It involves also the question of change of situation which occurring during neglectful repose may render relief inequitable. The real parties in interest here, the parties to be affected by the relief which is sought, are the owners of the land included in the district made taxable by the improvement. In the years that have passed since the maturity of the bonds and coupons, it is reasonable to assume that a very considerable portion of that land may have been conveyed or encumbered and that extensive improvements may have been made thereon."

Why should it be deemed expedient or right that those, who like this defendant in error, have remained supine all these years, should be now hedged about and protected from the operation of the statute of limitations and the court be expected to create a palpable legal anomaly on their behalf, by doing violence to the express language of the statute, in admitting the accrual of the cause of action and yet holding that the statute has not run?

To ask the court to so hold is simply indulging fantastic theories of the kind mentioned in the case of Campbell vs. Haverhill, 39 L. Ed., (U. S.) 280, where the court was also in effect requested to consider that the plaintiffs belonged to a privileged class and where the United States Supreme Court said:

"Unless this be the law, we have the anomaly of a distinct class of actions *subject to no limitation whatever*; a class of privileged plaintiffs who, in this particular, are outside the pale of the law, and subject to no limitation of time in which they may institute their actions. The result is that users of patented articles, perhaps innocent of any wrong intention, may be fretted by actions brought against them after all their witnesses are dead, and perhaps after all memory of the transaction is lost to them. This cannot have been within the contemplation of the legislative power. As was said by Chief Justice Marshall in Adams vs. Woods, 6 U. S., 2 Cranch, 336, 342, (2; 298, 299,) of a similar statute: 'This would be utterly repugnant to the genius of our laws. In a country within which not even treason can be prosecuted after the lapse of three years, it can scarcely be supposed that an individual would remain forever liable to a pecuniary forfeiture.'

Whatever prejudice there may have been in ancient times against statutes of limitations, it is a cardinal principle of modern law and of this court, that they are to be treated as statutes of repose, and *are not to be construed so as to defeat their obvious intent* to secure the prompt enforcement of claims during the lives of the witnesses, and when their recollection may be presumed to be still unimpaired. As was said of the statute of limitations by Mr. Justice Story (Bell vs. Morrison, 26 U. S., 1 Pet. 351, 360 (7; 174, 178.) 'It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security from stale demands, af-

> ter the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of the witnesses.' ''

Since the plaintiffs here as well as other similar creditors, have long delayed to press their claims, and valuable property rights have been acquired by others within the district of the defendant corporation, upon the supposition that the bonds here sued on were invalid, and that the holders thereof were thus treating them as invalid, it works no injustice upon plaintiffs to here hold that their claims are barred by the statute. They alone are to blame that the general impression prevailed in Southern California that no effort would be made to enforce payment of the bonds and their coupons, and that such bonds and coupons were *uncollectible* and non-enforceable. They alone are to blame for lulling purchasers of real property within the district into a belief of perfect security from such claims as are here pressed.

The old doctrine that the statute of limitations was founded upon the theory that lapse of time presumed payment has long since been exploded, and the courts in line with the case last cited now openly and generally announce that statutes of limitations are statutes of repose, based upon sound public policy and are to be favored.

In Nichols vs. Randall, 136 Cal., 432, the Court there says:

> "Statutes of limitation have become rules of property. They are vital to the welfare of society and are favored in law. They are found and approved in all systems of enlightened jurisprudence; they

promote repose by giving security and stability to human affairs; important public policy lies at their foundation; they stimulate to activity and prevent negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof unnecessary."

"Wood vs. Carpenter, 101 U. S., 135, 139; Shain vs. Sresovich, 104 Cal., 406."

If the "particular fund doctrine" could be held applicable here, it would be equally appropriate to apply it to every municipal bond issued and thereby deprive all municipalities of the plea of the statute of limitations, because as was said by the Supreme Court of Illinois in People vs. Scoon, 97 N. E., 310, "All bonds of municipalities are in effect payable out of a special fund."

In this connection, we invite the attention of the court to the fact that in California, it seems to have been almost the uniform practice of the legislature to provide a fund—equally as much a particular fund as that mentioned in the Wright Irrigation Act—for the payment of bonds, as will be seen from a scrutiny of the following statutes:

Statutes of California, 1861, p. 242 (S. F. School Bonds).

Statutes of California, 1863, p. 583, Secs. 6 and 7 (Asylum bonds).

Statutes of California, 1889, p. 361, section 6. (Parks and Boulevard bonds.)

Statutes of California, 1891, p. 30, section 22. (Levee District bonds.)

Statutes of California, 1891, p. 223, section 13. (Sanitary District bonds).

Statutes of California, 1891, p. 110, section 5. (S. F. Depot bonds.)

Statutes of California, 1907, p. 772, section 5. (S. F. Sea Wall bonds,)

Statutes of California, 1907, p. 781, section 5. (S. F. Harbor bonds.)

Statutes of California, 1913, p. 1122, section 5. (S. F. Sea Wall bonds.)

Statutes of California, 1913, p. 815, section 21. (Water District bonds.)

Statutes of California, 1891, p. 116, section 38. (Street Imp. bonds.)

In the last statute cited above, the legislature especially confined the remedy of the bondholder (by statute and recital in the bond) to the particular fund and stated that the municipality was not liable thereon. This would seem to indicate that the legislature understood the distinction between a *general* and *special* obligation, and that when the latter was the kind contemplated, it expressly provided that the bondholder could look to *no other fund for payment.*

The bond statutes we have mentioned, are only a few of the numerous statutes enacted by the California legislature, which provide for the creation of a fund with which to pay the bonds authorized to be issued in the premises, and yet if the so-called "particular fund doctrine" is to be considered controlling in this case, thereby working a stultification of the ordinary, well-settled

effect of the statute of limitations, where is any limit to be fixed to such deprivation of the right of the municipality to avail itself of a defense specifically provided by law? Even the California legislature is prohibited by the State constitution from enacting any special law upon the subject of the limitation of actions (Subd. of section 25 of article IV of California Constitution) and yet, to sustain the contention of the defendant in error and hold that the statute shall not run, where an irrigation district is concerned, would be, we respectfully submit, essaying to do something which in its results, is tantamount to invading a domain from which the law making power itself is excluded by that constitution.

All the courts, both Federal and State, have been open to the defendant in error during the many years that have elapsed since the respective maturity dates of these coupons and there exists no reason or justification whatever for his long continued delay in instituting this action for a judgment on these coupons. Furthermore, the Wright Act provides a method of which a bondholder can avail himself should the officers of the district fail to raise sufficient funds to meet the payments falling due on the coupons, and section 22 of the act (Cal. Stat. 1889, p. 16), says:

> "In case of the neglect or refusal of the board of directors to cause such assessment and levy to be made, as in this act provided, then the assessment of property made by the county assessor and the State Board of Equalization shall be adopted and shall be the basis of assessments for the district, and the board of supervisors of the county in which

the office of the board of directors is situated shall cause an assessment roll for said district to be prepared, and shall make the levy required by this act in the same manner and with like effect as if the same had been made by said board of directors, and all expenses incident thereto shall be borne by such district. In case of the neglect or refusal of the collector or treasurer of the district to perform the duties imposed by law, then the tax collector and treasurer of the county in which the office of the board of directors is situated, must respectively perform such duties, and shall be accountable therefor upon their official bonds as in other cases."

Without taking advantage of this alternative method by applying to the county supervisors or county tax collector for relief; without demanding of the officers of the irrigation district that any tax should be levied or fund provided, without even presenting a single coupon to the treasurer of the district and demanding payment, the defendant in error remained quiescent throughout a period of years and neglected to utilize the opportunities afforded by the courts and the statute to enforce payment of these coupons, until a large number of the coupons had matured far more than four years before the date of the commencement of this action.

Cases Appearing to Support Particular Fund Doctrine Are Inapplicable Here.

Lincoln County vs. Luning.

One of the cases relied upon by the defendant in error in the court below was that of Lincoln County vs.

Luning, 33 L. Ed., (U. S.) 766, which was decided by the United States Supreme Court in the year 1890. That was an action on bonds and coupons of Lincoln County, Nevada, which seems to have been misunderstood by our opponent.

By reference to the case of Davis vs. Board, etc., vs. Lincoln Co. 45 Pac., 982 (which was also a suit on some of the same issue of Lincoln County Bonds), it will be seen that the act of 1873, authorizing these bonds, provided for a *special tax* to be levied annually and placed in a fund to be used *only* for the payment of the interest. It is evident from the case, that if the act of 1873 had been all that had been done relative to these bonds, the statute of limitations would have been applicable. This conclusion is fortified from the very fact that the legislature thought it necessary to pass a special act (1877) providing that if there were not funds to pay the interest on these bonds, the bondholder might present them and have the certificate of presentation endorsed thereon, after which the coupons would be payable in the order of presentation.

Upon this subject, the U. S. Supreme Court said:

> "The remaining question arises on the statute of limitations. By the general limitation law of the State some of the coupons were barred; *but there has been this special legislation in reference to these coupons.* The bonds were issued under the Funding Act of 1873. In 1877 the county was delinquent in its interest, and the legislature passed an act amendatory to the act of 1873. This amendatory act provided for the registering of overdue

coupons, and imposed upon the treasurer the *duty of thereafter paying the coupons as money came into his possession* applicable thereto, in the order of their registration. Statutes of Nevada 1877, 46.

The coupons which by the general limitation law would have been barred were presented, as they fell due, to the treasurer for payment, and payment demanded and refused, because the interest fund was exhausted. Thereupon the treasurer registered them as presented, in accordance with the act of 1877, and from the time of their registration to the commencement of this suit there was no money in the treasury applicable to their payment. This act, providing for registration and for payment in a particular order, *was a new provision for the payment of these bonds*, *which was accepted by the creditor*, *and created a new right upon which he might rely*. It provided, as it were, a special trust fund, to which the coupon holder might, in the order of registration, look for payment, and for payment through which he might safely wait. It amounted to a promise on the part of the county to to pay such coupons as were registered, in the order of their registration, *as fast as money came into the interest fund;* and such promise was by the creditor accepted; and when payment is provided for out of a particular fund to be created by the act of the debtor, he cannot plead the statute of limitations until he shows that that fund has been provided.

The cases of Underhill vs. Sonora, 17 Cal., 172, and Freehill vs. Chamberlain, 65 Cal., 603, are in point. In the former case the court observes that "the legislative acts then *recognized the debt* and

made provision for its payment. This is enough to withdraw the case from the operation of the statute; it is equivalent to a trust deed by the State setting apart property out of which the money due was to be paid at a given time, if not sooner paid upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute simply because the creditor waited after this for his money.'' In the other case it was held that "where a statute provides for the issuing of bonds of a city with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act."

33 L. Ed. pgs. 767-768.

Where in the case at bar, is any similarity to the Luning case? It is very clear that in the latter case, the court planted its decision on the fact that, subsequent to the original act, under which the bonds were issued, a special act was passed, which the court held was a *recognition* of the debt and that the new provisions of the subsequent act, providing for registration etc., imposed the duty on the treasurer of "paying the coupons as money came into his possession."

This subsequent act, the Court says, "created a *new right*" and amounted to a promise to pay the coupons "as fast as money came into the interest fund." In fine, the court simply holds that the act of 1877 *extended the time for paying the coupons.*

This is also shown by the case of Davis vs. Lincoln County, (Nev.) 45 Pac., 982, which was decided after the Luning case, where the Nevada Supreme Court squarely holds that the Act of 1877 was the equivalent of an agreement for *an extension of time* for payment of the debt and says:

> "By the act of 1877 they were to be paid as fast as the annual levy of 45 cents on each $100 of property in the county would produce sufficient money therefor. How soon that would be, would, of course, depend upon the amount of property in the county, and the amount of coupons that might be presented under the act, and the order of their presentation. They might be paid in one year, and they might not all be paid in twenty years. *The creditor accepted this proposition when he presented his coupons* and had their presentation certified by the treasurer. *This was in the nature of an agreement for an extension of time for their payment. The creditor agreed to wait, no matter how long it might take, for payment under that arrangement and he has waited accordingly.* As long as the tax was being levied and collected, there was no occasion for him to bring an action, and, if he had, *it seems very probable it could not have been maintained had the proper defense been made.*"

It is obvious that without the subsequent Act of 1877 an entirely different status would have existed and *that act alone* is made the foundation of both the decision of the Federal Supreme Court and the Nevada Court.

In the case at bar, there is no pretense of any statutory extension of time or subsequent act providing for registration of coupons or covering anything else con-

nected with the subject, and where, as we have seen, by express statute of this state it is provided that *there can be no exception*, unspecified by the legislature, made to the statute of limitations, it is futile to argue that the Luning case is applicable here.

In determining the correct interpretation of the Lincoln County vs. Luning decision, the reference to the case, by Abbott in his excellent new work on Municipal Securities, at page 408, is helpful:

> "An Act of the Legislature, (1877), providing for the registration of overdue coupons of a county and requiring the county treasurer to pay them thereafter from designated funds, will be regarded as a new provision for their payment, *which saves the right of action thereon from the statute of limitations.*"

It will also be noted that in the Luning case, the Court refers to the cases of Underhill vs. Sonora, 17 Cal., 172, and Freehill vs. Chamberlain, 65 Cal., 603, as furnishing support to the decision, but a careful examination of those two California cases shows that they cannot rule the case at bar, as the facts in those cases were widely divergent from the situation here.

Upon this subject, in the case of Schoenhoeft vs. Kearny County, 92 Pac., 1097, where a money judgment was sought on unpaid coupons, the Supreme Court of Kansas held that the statute of limitations had run against the coupons, although no funds had been provided by the county. From some decisions, it appears that warrants have been favorite instruments with the courts to which to apply the particular fund

doctrine, (Herring vs. Modesto Irr. Dist. 95 Fed., 705,) and the Kansas court dwells upon the distinction existing between bonds and warrants and we particularly draw the attention of the Court to the remarks, made by the Kansas Court, with reference to the Luning case and the California cases mentioned in the Luning decision. The Kansas Court says:

> "Although warrants may take the form of negotiable paper, and be made payable at a specific date, they are not negotiable in a commercial sense, belong in a class by themselves, and *are fundamentally different* from the ordinary municipal bonds and coupons representing installments of interest upon such bonds. This is made clear by the general law relating to the issuing, registration, and order of payment of municipal warrants. All warrants must specify out of what fund they are payable and the nature of the claim or service for which they are issued. The clerk and treasurer of the municipality both make a record of them before delivery. It is the treasurer's duty to pay them on presentation, provided, however, he has sufficient money in the fund on which they are drawn to do so. If the treasurer cannot pay on presentation, he stamps them, "Presented and not paid for want of funds," and registers them. Thereafter, they are to be paid in order of registration, and, as the funds come in, the treasursr sets apart a sufficient sum to take them up. At stated times the treasurer publishes a call for the redemption of as many warrants as he can pay, and interest upon them ceases after publication of the call. (Gen. St. 1901, c. 87.) Under this statute, warrants are

simply drafts on anticipated revenue (City of Burton vs. Savings Bank, 28 Kan., 390; School District vs. Bank, 63 Kan., 668; 66 Pac., 630), which, whatever the form or expressed date of maturity, are not in law or in fact payable, except as from time to time money to meet them is received into the specific fund of the treasury upon which they are drawn. A judgment upon a warrant merely establishes the claim against the municipality, and it is still payable only in the order of its registration from the fund designated for the purpose. Obligations of the character of those in suit are *general promises to pay at all events upon a certain day*. True, a fund must be created by taxation to meet coupons representing the interest upon bonded indebtedness, but no particular fund is, at the time of their issue, expressly pledged in advance to their payment, and, *whether or not money has been raised to meet them, they are due and payable absolutely* upon the stated days of their maturity. Perhaps under exceptional circumstances warrants may sometimes become payable when funds to meet them ought to be in the treasury, but ordinarily it is *the condition of the public treasury which matures them*. Unless the circumstances be decidedly exceptional, *bonds and their attendant coupons mature according to contract.*

"The foregoing being true, it may properly be said that the legislature intended the statute of limitations should be regarded as commencing to run upon a warrant from the time funds are in the treasury, and not from the date of the instrument, or from the nominal date of maturity expressed on its face. In any event, a municipality with power

to provide the funds necessary to mature its out-outstanding warrants should not be allowed to assert its own neglect to take steps to that end for the purpose of raising the bar of the statute. But, since all the reasons upon which such conclusions are based, fall in respect to ordinary negotiable bonds and coupons, they must be left to be governed by the law applicable to instruments of the class to which they belong. The plaintiff's argument presumes largely upon general statements made in decisions referring to particular obligations governed by particular statutes. Thus the language of this court in the opinion in the case of Hubbell vs. South Hutchinson, 64 Kan., 645, 68 Pac., 52, is quoted as if decisive of this one. It was there said: 'This action was based upon certain written obligations, and, in the absence of intervening circumstances, would become barred within five years from the date of their issuance. It is the settled law of this State, however, that the statute of limitations does not run in favor of a municipal or quasi municipal corporation upon its outstanding obligations until the corporation has provided a fund with which payment thereof may be made. (School District vs. Bank, 63 Kan., 668; 66 Pac., 630), and cases there cited; Miller vs. Haskell County (Kan.), 66 Pac., 1084. The syllabus of the case, the authorities cited, and the context show that the court had in mind nothing but the specific class of instruments it was then considering, viz; municipal warrants. It was not the purpose to settle (or, more accurately stated, to overturn), the law relating to the limitation of actions upon ordinary municipal bonds.

The plaintiff maintains that, according to a cer-

tain line of decisions, when municipal bonds are payable out of a fund which the debtor must provide by a levy of taxes, it is estopped to plead the statute of limitations until that duty has been performed, and funds for payment have been provided by that method. It is claimed the decision in the case of Underhill vs. City of Sonora. 17 Cal., 172, is to that effect. The court announced *no such principle in that case*. The ground of the decision is apparent from the second paragraph of the syllabus, which reads: 'Bonds of the City of Sonora, dated March 25, 1853, and falling due in two years, are sued on April 5, 1860. March 9, 1855, an act of the Legislature was passed, re-incorporating the city, and providing that, 'In case the public debt is not liquidated at the expiration of three years, the trustees shall have power to levy a sufficient tax, in addition to the one per cent. authorized in another section for general purposes of revenue, to pay the outstanding debt.' March 29, 1858, another similar act was passed, the time mentioned being six, instead of three, years. These acts were passed at the instance of the corporators. Held, that these acts *recognize the city debt*, and provide for its payment; and *hence withdraw the bonds from the statute of limitations*." The opinion is equally clear. An abstract from it is quoted in School District vs. Bank, 63 Kan., 668, 671, 66 Pac., 630. The decision in the case of Freehill vs. Chamberlain, 65 Cal., 603, 4 Pac., 646, is cited. It is only necessary to quote the syllabus to show that the coupons there in suit were, by the statute authorizing their issue, *in effect placed in the same category as warrants in this State*. It reads: "Where a statute

provides for the issuing of bonds of a city, with interest coupons payable as fast as money should come into the treasury from special sources designated by the act, the statute of limitations does not commence to run against the coupons until the money is received in the treasury in accordance with the terms of the act. The interest coupons upon bonds of the City of Sacramento, issued under the act of April 24, 1858, are not demands which are required to be presented for allowance to the auditor or board of trustees. They are payable on presentation to the treasurer, whenever there are funds in his possession which have been appropriated to the payment of the coupons by the act authorizing the bonds." The case of Lincoln County vs. Luning, 133 U. S., 529, 10 Sup. Ct. 363, 33 L. Ed., 766, is relied upon. The coupons there involved *were virtually converted into treasury warrants* by an act of the Legislature passed after they were issued and accepted by the creditor. An extract from the opinion by Mr. Justice Brewer is quoted in School District vs. Bank, 63 Kan., 668, 671, 66 Pac., 630. The case of Sawyer vs. Colgan, 102 Cal., 292, 36 Pac., 580, is also referred to. The bonds there under consideration were state bonds issued under a special act for a special purpose. It was expected that Congress would provide funds to pay them. If it did not do so, the intention of the Legislature, as expressed in the act, was that they should be payable out of money which should be found in the State treasury at their maturity, and which should come into the treasury after maturity, that had not been appropriated to some other purpose. No surplus existed in the general fund of

the State treasury for many years after the date of maturity stated in the bonds had passed, and no provision for paying them was made. If they had been presented for payment, they could not have been paid for want of funds. *The bondholder could not sue the State*, for no law authorized him to do so. "The State by reason of her sovereignty still held control of the question of payment as to all its incidents of time, mode and measure." So it was said, upon the authority of Underhill vs. Sonora, Freehill vs. Chamberlain, and Lincoln County vs. Luning, that, "it is a general rule that when payment is provided for out of a particular fund, or in a particular way, the debtor cannot plead the statute of limitations without showing that the particular fund has been provided, or the method pursued." *This certainly falls very short of establishlishing the doctrine contended for.*"

So we say here, these coupons in the case at bar—like the coupons in the Kansas case—are "*general* promises to pay at all events, upon a certain day." No particular fund was at the time of their issue expressly pledged in advance for their payment, nor is their source of payment confined to any fund exclusively, and, as we have already seen, this same Kansas case holds that money accumulated from taxes, with which to meet a *general* obligation is not a "particular fund."

This is not a case similar to such cases as where the instruments are to be paid *solely* out of some specific source of municipal revenue—for instance revenue derived from operating a municipal waterworks, which so often has been a popular scheme for deriving funds to

pay municipal obligations—hence the coupons here must in accordance with their terms "mature according to contract'" and be deemed *general* obligations.

Furthermore, the very cases which the United States Supreme Court cites in the Luning case are altogether inapplicable here. It is only necessary to refer to Underhill vs. Sonora, 17 Cal., 173, to see that the federal court did not mean to say that the Underhill case furnishes any foundation for the "particular fund" doctrine, because such doctrine is not mentioned therein, but the doctrine of the recognition of the debt by subsequent legislation is mentioned and that is the point upon which the Underhill case turned.

As to the case of Freehill vs. Chamberlain, 65 Cal., 603, any assertion respecting the applicability of that case to the one at bar, would be equally untenable. The Freehill case is distinguishable from this case on several grounds. The Freehill case was one for mandamus against the treasurer of Sacramento to pay certain coupons representing interest on bonds issued under authority of act of the legislature of April 24th, 1858. Section 1 of the act (California statutes 1868, p. 268), provides that the City of Sacramento "*shall not be sued in any action whatever;*" the Wright Irrigation Act, on the contrary, permits an irrigation district to be sued. As the treasurer of Sacramento could not be compelled to pay the coupons until money came into his hands, of course, mandamus would not lie against him until that time and that was all the Freehill case really held.

The case of Barnes vs. Glide, 117 Cal., 1, discusses

the Freehill case and shows that the cause of action in the latter case *had not accrued*, thus furnishing the grounds—and under our statute of limitations *the only grounds*—for holding the statute had not been set in motion. The Barnes case was an action for mandamus against the trustees of a Swamp Land District, to compel them to levy an assessment upon the lands of the district for the purpose of paying certain warrants. The warrants directed the treasurer to pay the sum mentioned therein "from the Swamp Land Fund," and had, prior to the commencement of the action, been presented for payment and been marked "not paid for want of funds," and thereafter, registered. In the complaint, it was alleged that since the issuance of the warrants, there never had been in the treasury of the county, to the credit of the Swamp Land District, sufficient money to pay the warrants, but it was also alleged that the defendants had money in their hands, belonging to the district and it was prayed that the same be turned over to the county treasurer.

The act providing for the organization of such districts is found in Cal. Stats. of 1868, p. 515, and contains many features similar in effect to the Wright Irrigation District Act. In fact, the Fallbrook Irr. Dist. vs. Bradley, 41 L. Ed. (U. S.) 393, the Federal Supreme Court, said:

> "The formation of irrigation districts is accomplished by a proceeding so closely analogous to those prescribed for the formation of swamp land reclamation districts that *the decisions with respect to the latter are authority as to the former*, and we

cite as conclusive of this point People vs. Hagar, 52 Cal., 181, 66 Cal., 60. Many decisions to the same effect are cited by the briefs of counsel, but we deem it unnecessary to refer to them."

It would be observed that in the Barnes case, *warrants* were involved, drawn upon a fund, called the "Swamp Land Fund," and which warrants had been registered. The defendants pleaded the statute of limitations. From the abstract of the appellant's brief, accompanying the opinion of the Court (117 Cal., 2), it appears he also adopted the attitude taken by the defendant in error here, and in order to avoid the statute of limitations, claimed that the cause of action had not accrued *on the warrants*, but possibly this attitude was not so fatal to the appellent in the Barnes case, as it is here to the defendant in error, because the Barnes case was one for mandamus against the officers of the district, while here the case is brought against the Irrigation District itself and a *money judgment is asked for on coupons*. Should we assume that the defendant in error is correct in saying these coupons here are payable from a particular fund, we are even then not confined to the question whether mandamus will lie against the officers of an irrigation district to compel them to levy an assessment for the purpose of replenishing such fund. The question here would be more comprehensive than that and would be: whether an instrument, assumed to be drawn on a "particular fund"—which term involves the theory that such instrument fastens no *general* liability on its maker, the creditor being confined to such fund for payment—can maintain an action, not for man-

damus, but *for a money judgment on the coupons themselves*, when he alleges there is no money in the only source from which they are payable and to which source he is compelled to look alone for payment?

If he is not so compelled, then a *general* liability of the maker arises, as we have seen from the authorities cited, and the "particular fund" theory necessarily vanishes.

On the other hand, should it be held that the fund under discussion here is strictly a "particular fund" and that, notwithstanding this, the defendant in error can maintain suit regardless of the non-existence of such fund, then he must concede that his cause of action *accrued* many years ago. If this action did so accrue, the statute necessarily became active.

Notwithstanding the instruments in the Barnes case were registered warrants (and therefore fell within the class of paper to which the particular fund doctrine has been applied, by the courts with peculiar force, and notwithstanding there were infinitely better grounds for calling the fund in the Barnes case a "particular fund" than exist here), the Supreme Court of California held that the statute barred the suit, and said:

> "The reason and philosophy upon which the statute of limitations is based apply here with full force. The warrant set up in the first count of the complaint was issued, presented, and payment thereon was refused, in November, 1877; and this present suit was not commenced until November, 1895, which was eighteen years thereafter. The date of the latest warrant set up in the complaint is

1881, more than fourteen years before the commencement of the action. The present board of trustees, who are made defendants, do not appear to have occupied that position for a longer period than six months prior to the commencement of the suit. The warrants sued on were issued, if at all, by other trustees who were in office from fifteen to eighteen years before this proceeding was instituted. They may have been issued illegally; the act of issuing the mmay have been ultra vires; they may not have been issued for any labor done in the construction of the works of the district; they may have been issued without consideration and fraudulently; they may be forgeries. And it is quite evident that the present defendants, after such a lapse of time, would be in no condition to make any of the defenses above indicated, when witnesses who knew of the facts at the time may be dead, or may have allowed the recollection of them to vanish from their memories. And the evident purpose of the statute of limitations is to prevent such a condition of affairs, and to preclude parties from disturbing that repose which is intended to be final, after the lapse of certain periods of time designated in the statute itself. The position *cannot be successfully maintained* that no action could be commenced *until a demand had been made* by plaintiff upon the defendants to act. Whether such demand be necessary in a case like the present it is not necessary to determine; for *the demand itself was an act within the power of the plaintiff.* In Prescott vs. Gonser, 34 Iowa, 179, the court say:"

"That the action of mandamus cannot be maintained until there has been a refusal to perform the official duty sought to be enforced is true, but to

hold that the plaintiff who has a right to demand performance at any time may delay such demand indefinitely would enable him to defeat the object and purpose of the statute. It is certainly not the policy of the law to permit a party against whom the statute runs to defeat its operation by neglecting to do an act which devolves upon him in order to perfect his remedy against another. If this were so, a party would have it in his own power to defeat the purpose of the statute in all cases of this character. He could neglect to claim that to which he is entitled for even fifty years unaffected by the statute of limitations, thereby rendering it a dead letter. In such a construction of the statute we cannot concur." See, also, to the same effect, Baker vs. Johnson County, 33 Iowa, 151. If the facts stated in the complaint in the case at bar constitute a cause of action, they constitute a cause of action which accrued, and for which an action might have been instituted, from fourteen to eighteen years before the present complaint was filed. The *statute of limitations is intended to embrace all causes of action not specially excepted from its operation;* and there is no exception applicable to the present proceeding. Bates vs. Gregory, 89 Cal., 387, was an application for a writ of mandate to compel the trustees of the City of Sacramento to do certain acts; the defendants therein set up the statute of limitations; and this court said: "A municipal corporation has the legal right to avail itself of the defense of the statute of limitations as fully as any other creditor. It is a privilege personal to the debtor, and whenever, in any legal proceeding it is invoked by the debtor the court is

compelled to recognize it as a proper defense. This defense is pleaded in the present proceeding, and, as we have before show, is sustained by the facts, and must therefore be held sufficient."

Appellant relies greatly on Freehill vs. Chamberlain, 65 Cal., 603; but *that case is not pertinent to the case at bar*. That case was simply mandamus to the treasurer of the city of Sacramento to compel him to pay the interest on certain bonds. Those bonds had been issued by the city under the act of April 24, 1858 (Statutes of 1858, p. 280,) which has frequently been held by this court to constitute an express contract between the city and the bondholders, by which the latter *were prohibited from suing the city*, and were to rely exclusively upon a certain special fund district from the general fund and all other funds of said city. The *only remedy* which the bondholders had was mandamus against the city treasurer to compel him to pay the interest on the bonds when there was money in the fund *to which they could alone look* under their special contract; and *all that the court decided* in Freehill vs. Chamberlain was that no cause of action in mandamus against said treasurer had accrued until there was money in said fund, and that consequently the statute of limitations did not commence to run while there was no money in said fund with which the treasurer could pay said interest. It was not a proceeding which might have been commenced fifteen years before it was instituted.

Barnes vs. Glide, 117 Cal., pgs. 7, 8 and 9.

We submit the language of the California Court is singularly appropriate here. Why should the Rialto

Irrigation District, comprising thousands of acres of land and the interests of a multitude of industrious ranchers, be subjected to the hardship of having a special exception—not mentioned by the legislature—engrafted upon the statute of limitations for the benefit of the defendant in error, who until the commencement of this action, never took a single step to enforce the payment of these coupons? Here, as in the Barnes case, the district board of directors is not the same as the one which existed when these bonds were issued a quarter of a century ago; here, as in that case, witnesses are dead and scattered; here, as in that case, if the facts stated in the complaint constitute any cause of action at all, they constitute a cause of action which accrued on many of the coupons, and for which an action might have been instituted more than ten years before this action was commenced; here we may truly say, as was said in the Barnes case, "the statute of limitations is extended to embrace *all* causes of action not specially excepted from its operation and *there is no exception applicable to the to the present proceeding*.."

In the Barnes case, we submit, the remarks of the court, with reference to the Freehill case, are unanswerable and obviously cut away the foundation of any hypothesis that the Freehill case is authority for anything more than the point that no cause of action in mandamus had *accrued* against the treasurer until there was money in the fund in question. How could such a cause of action otherwise accrue against him? He could not be mandamused to perform an impossibility, to-wit:

to pay to coupon holders funds which were non-existent; and of course, no action could lie on the coupons against the City of Sacramento, because the law forbade it, and hence the case fell within a statutory exception to the running of the statute of limitations.

Section 356 of our Code of Civil Procedure says:

> "When the commencement of an action is stayed by injunction *or statutory prohibition*, the time of the continuance of the injunction or prohibition is not part of the time limited for the commencement of the action."

To the same effect is Section 27, enacted in the year 1850, (Cal. Statutes 1850, p. 346.)

In Kendall vs. Porter, 120 Cal., 106, the plaintiff applied for a writ of mandate to compel the treasurer of Sacramento to pay the principal and interest on certain bonds, and the precise question we are now discussing was not involved in that case, but in a dissenting opinion of Chief Justice Beatty, in which Mr. Justice Van Fleet concurs, it is said:

> "In Freehill vs. Chamberlain, *supra*, which was mandamus to compel the treasurer to pay coupons more than four years past due, the statute of limitations was interposed as a defense, but it was held that, since *the city could not be sued* upon the coupons, the statute did not begin to run until the money applicable to the payment of the coupons was in the sinking fund, *the implicit concession being that the coupons would have been barred if there had been any general obligation resting upon the city to pay.*"

As it cannot be questioned the coupons, in the case at

bar, fix a *general* obligation to pay them upon the irrigation district, it is useless to argue that those coupons which matured four years or more before this action was commenced are not barred by the statute. If the explicit and express promises to pay, contained in those coupons, do not constitute "general" obligations, by what other language, we ask, would it be possible to make an obligation a "general" one?

The case of Savings Union vs. Reclamation District, 144 Cal., 659, is instructive and in point. That case was an action to recover money due on warrants drawn by order of the board of trustees of the defendant on the county treasurer, approved by the board of supervisors, and not paid for want of funds. While the question there at issue is not directly involved in the case at bar, the court distinctly holds that no suit on the warrants could be brought against the district itself and recognizes the propositions herein contended for, notwithstanding the Luning case and Robertson vs. Blaine County and others were cited as upholding the particular fund doctrine. At page 648, there is found the following language:

> "The claims accrued during the period from 1872 to 1887. They were all allowed, warrants drawn, payment refused for want of funds, and *all existing remedies to compel payment barred by the statute of limitations* many years prior to the enactment of the amendment. If the amendment is construed to give the right to maintain an ordinary action at law upon these allowed claims, it will be of no benefit whatever to the plaintiff. Its right to

a mandate, either against the county treasurer to compel payment, if there were in fact available funds, *or against the trustees and supervisors* to compel an assesment to raise funds, if in fact there were none, *became complete and perfect upon the original refusal to pay the claims*. The statute of limitations at once began to run against this right, and become barred within five years thereafter, if not sooner. (Barnes vs. Glide, 117 Cal., 1.) A judgment against the defendant in an action upon these claims would be of no direct benefit to the plaintiff, and would set him no further on the road to recovery of his money than he was at the time the claims were originally allowed. The judgment could not be collected on execution. The district has, and under ordinary circumstances could have, no property subject to execution. (Hensley vs. Reclamation District, 121 Cal., 96.) It has no right to acquire property except for the purpose of carrying on the work of reclamation and matters incidental thereto. Property devoted to that sort of public use, and belonging to a public corporation or public agency, cannot be levied on and sold to satisfy judgments against such corporation or agency. The only means by which the plaintiff could obtain payment of such a judgment would be by resort to the remedy which he had in the first instance, that is to say, a suit in mandamus to compel the levying of an assessment whereby money could be raised with which to pay the same. But this remedy, as we have seen, has been long since barred."

Although our case was unlike the last case, because in the latter an action *on the warrants* did not lie

against the reclamation district, yet this very dissimilarity obviously adds strength to our contention, because the entire controversy here harks back to the question—when could the defendant in error have brought suit against the irrigation district on these coupons? The reply to that query will also answer the question as to when the statute of limitations was set in motion.

With these California authorities in mind, and adverting again to the case of Lincoln County vs. Luning, it is clear that it is a mistaken notion to hold that the case at bar is governed by the Luning case because:

(1.) The pivotal point on which the Luning decision turned was the recognition of the debt and the extension of time for its payment arising from the act of 1877.

(2.) That act of 1877, after the creditor had acted upon it and registered his coupons, was held to amount to a new provision for payment, which was accepted by the creditor and created a new right upon which he could rely.

(3.) The California cases of Underhill vs. Sonora and Freehill vs. Chamberlain, cited in the Luning case, supply no foundation for the broad statement that in a suit brought on *general* obligations, the statute will not run from the maturity of such obligations.

(4.) That should the citation in the Luning case of these two California cases, be deemed to furnish a foundation for the idea that the Federal Supreme Court, based its decision in the Luning case upon two California cases where the situation was similar to the one pre-

sented in the case at bar, such assumption would necessarily result in making an inverted and baseless pyramid of the Luning decision and would be charging that high court with being devoid of logic or common sense.

(5.) It is not necessary so to do, because the language of that court shows that the Underhill case was only cited on the proposition that the act of 1877 recognized the debt and made provision for its payment, thereby *extending the time of payment*; and the Freehill case was only cited on the proposition that where a statute provides for coupons being payable "as fast *as money should come into the treasury* from *special* sources" the statute will not run. As we have seen, the Freehill case did hold that no cause of action against the treasurer accrued until he had money in his hands, and no cause of action had accrued against the city, as the city *could not be sued*, hence Freehill was prevented from having his day in court. Here, the defendant in error was not obliged to wait, before bringing his action, until money came into the treasury of the district. This is not a case where there is anything whatever in the coupons which suggests or intimates that they are only payable or only mature "*as fast as money should come into the treasury.*" Nor can a *general* liability which by Sec. 17 of the Wright Act (Cal. Stats., 1887, p. 37,) is to be paid by revenue derived from annual assessments upon all of the real property of the district—all of which real property is expressly made liable to such assessment—be converted into an obligation payable solely from "special sources." To hold otherwise would not

only make all municipal bonds subject to the particular fund doctrine, but such a decision would be hopelessly irreconcilable with such cases as

Schoenhoeft vs. Kearney Co., 92 Pac., 1097.

United States vs. Clark Co., 24 L. Ed., (U. S.) 628.

Avery vs. Job, 36 Pac., 293; Mutual Benefit Insurance Co. vs. Elizabeth, 42 N. J, L., 235.

United States vs. Fort Scott, 25 L. Ed., (U. S.,) 349.

Vickey vs. Sioux City, 115 Fed., 437.

United States vs. Saunders, 124 Fed., 131.

Kimball vs. Commissioners, 21 Fed., 145.

Eaton vs. Mimnaugh, 73 Pac., 745.

(6.) In the Luning case, no mention is made of the existence of any mandatory statute of limitations similar to section 312 of our code, which admits of no unspecified exception being made to its operation, which section is backed by our State constitution prohibiting the enactment of special legislation respecting the statute of limitations.

(7.) Since the rendition of the Luning decision, in the year 1890, our State Supreme Court has rendered such decisions as Barnes vs. Glide, 117 Cal., 1; S. F. Savings Union vs. Reclamation District, 144 Cal., 639, and Cal. Safe Co. vs. Sierra Rwy. Co., 158 Cal., 691, holding that the statute runs against such coupons as these. This being the case, should we indulge the baseless presumption that the Luning case was ever applicable to this case at bar, it still remains true that the

Federal Courts will follow the latest expressions of the California Supreme Court in construing the statute of limitations (Leffingwell vs. Warren, 17 L. Ed., (U. S.) 271), even though they be at variance with former decisions of the same court, which is certainly not the case with respect to the decisions of the California Supreme Court on this subject.

We have discussed the Luning case at such length because it seems to have been particularly relied upon by the learned District Court and by our opponents as the leading case on the particular fund doctrine and as a precedent to apply to the case at bar, but it would seem that this discussion is largely an act of supererogation when it is recalled that this same Circuit Court of Appeals, in the case of Mather vs. San Francisco, 115 Fed., 37, decided in the year 1902, that neither the Luning case, nor the particular fund doctrine was applicable to California municipal bonds, and ploughed over the same ground that we are now traversing.

Mather vs. San Francisco.

In the Mather case, the identical Section 337 of our code which is pleaded by the irrigation district here was pleaded also there. In the brief of the plaintiff in error, filed in this court in that case, it is stated "that the complaint alleges that there hasn ever been collected and placed in special fund a sufficient amount to pay the coupons as they mature." On page 24 of this brief, the particular fund doctrine is discussed and he cites, in support of his contention, the same cases upon which

our antagonist relied in the court below, among which are:

Sawyer vs. Colgan. 102 Cal., 292.

Freehill vs. Chamberlain, 65 Cal., 603.

Lincoln County vs. Luning, 133 U. S., 533, and says:

"Cannot plead statute of limitations without showing that the particular fund has been provided or method pursued."

The bonds and coupons involved in the Mather case presented a much stronger case for the application of the particular fund doctrine than those in the case at bar, as the act under which they were issued provides (Cal. Stats., 1875-76, p. 433) that assessments made to create a fund, with which to pay the bonds and coupons should be restricted to a certain area of the municipality; thal the fund so raised should be paid over to the treasurer of San Francisco, and should constitute a fund called "Dupont Street Fund," which fund should be paid out *only* in payment of the bonds and coupons and, by section 22 of the act, the holders of the bonds were stripped of any claim, they would otherwise have had, *against the municipality* on the bonds.

This court, through Mr. Justice Gilbert, points out in its opinion, that the bonds had not been paid "for the reason that the fund for the payment thereof has not been created as the law required that it should be created." (p. 42). This court further holds that the bonds are payable "*out of a special fund* to be provided by the city" (p. 42) and that "the defendant in error

has been remiss in the performance of its duty" (in not providing such fund). This court further said:

> "The demurrer raises the further objection that the cause of action upon all but two of the coupons is barred by the statute of limitations. Section 9 of the act provides that the bonds shall be payable in 20 years, and that coupons for the semi-annual interest shall be attached to each bond. The bonds bear date January 1, 1877. The present suit was commenced June 22, 1900. By the statute of limitations of California (section 337, Code Civ. Proc.) *actions on such written instruments are barred after four years.* All the coupons matured more than four years prior to the commencement of this suit, except the last two, which became due, respectively, July 1, 1896, and January 1, 1897. In Leffingwell vs. Warren, 2 Black, 599, 17 L. Ed., 261, it was said:
>
> '"The courts of the United States, in the absence of legislation upon the subject by congress, recognize the statutes of the several States, and *give them the same construction and effect which are given by the local tribunals.*"
>
> That doctrine has been affirmed in Green vs. Neal's Lessee, 6 Pet., 291, 8 L. Ed., 402; Harpending vs. Dutch Church, 16 Pet., 455, 10 L. Ed., 1029; Davie vs. Briggs, 97 U. S., 628, 24 L. Ed., 1086; and Amy vs. Dubuque, 98 U. S., 470, 25 L. Ed., 228. In the case last cited it was also held that the statute of limitations of the State of Iowa begins to run against coupon interest warrants from the time when they respectively mature, although they remain attached to the bond which represents the principal debt. In reaching that

conclusion the court proceeded upon principles which apply generally *to all cases of actions upon coupons*, except where the question is controlled by some peculiar statutory provision or decision of a State court establishing a different rule. Those principles *undoubtedly apply to the case at bar*, and require us to hold that the statute of limitations has run as to all coupons except the last two, unless a different construction has been placed upon the statute of California by the decision of the Supreme Court of that State in Meyer vs. Porter, 65 Cal., 67, 2 Pac., 884, in which it was said: 'And as the coupons partake of the nature of the bonds to which they belong, and against which the statute of limitations had not run, they were not barred by the statute.' It is claimed for this utterance of the court that it announces the rule that an action upon coupons is not barred until the statute of limitations has run against the bonds to which they were attached. We do not so understand the decision, although it is impossible, from the meager statement of the case, to determine the precise bearing of the remarks of the court. We are inclined to think that by the use of the language so quoted it was intended only to affirm the well-settled rule that in the application of the statute of limitations the coupon, although it may not be in form the same kind of instrument as the bond to which it belongs, will partake of the contractual nature of the latter, and both will be governed by the same statute of limitations; that is to say, if the bond be a specialty, the coupon, which may be a simple promise to pay, will be considered a specialty, and be governed by the statute of limitations applicable to specialties."

It is interesting to note that in the recent case of Cal-

iforuia Safe etc. Co. vs. Sierra Co., 158 Cal., 693, (from which case, we have already quoted in this brief and where were involved bonds issued long after the date of the decision of Meyer vs. Porter) the California Supreme Court concurs in the views of this court, respecting the case of Meyer vs. Porter, and adds that there is nothing in the latter case to prevent the court "from applying the rule supported by reason, *as well as by overwhelming authority*, viz: that, in the absence of some special circumstance to the contrary, the period of limitation of an action on coupons begins to run *from the date of the maturity of the coupons.*"

It is difficult indeed to see how the California court could have logically held otherwise when it is borne in mind that the same court had repeatedly held, long before the decision of Meyer vs. Porter, that our statute of limitations applies to *all* actions and that the courts can add no exceptions to the statute, and the federal courts had also previously held that the statute runs against coupons without reference to the maturity of the bonds.

(Koshkoning vs. Burton, 26 L. Ed. 886.
Amy vs. Dubuque, 25 L. Ed., 228.)

To adopt the theory that the court in Meyer vs. Porter intended to express the idea that no action would accrue upon a coupon until the maturity date of the principal of the bond to which the coupon belonged, would result in placing the court in a position where it would be isolated by overwhelming authority to the contrary. Under Section 312, C. C. P., it is certainly necessary to show that no action on these coupons has accrued,

before any foundation can exist for the supposition that the statute has not run against them.

In 19 Am. and Eng. Enc. of Law, (2nd Ed.,) p. 205, it is said:

> "Where payments are to be made in installments, the statute runs against each installment from *the time when it is due.*" (Citing numerous cases.)

That this is the general rule cannot be denied, and there exists here no special circumstance which causes this case to fall within any exception specified in our statute of limitations.

Furthermore, should we assume that the California court in Meyer vs. Porter did—in defiance of well-settled principles and notwithstanding the same court has explained the case in a contrary way—really announce the doctrine unsuccessfully contended for in the Mather case, it would even then, we respectfully submit, make no difference, or preclude this court from ignoring the Meyer case and following later decisions, because such doctrine simply referred to the statute of limitations. It is an elementary principle that the statute affects only the *remedy* and not the *obligation* of a contract, and the legislature may make any reasonable change in the length of the period of limitation within which to commence an action upon an existing contract; because the parties to a contract acquire no vested right in the time for commencing such action.

Terry vs. Anderson, 24 L. Ed. (U. S.), 365.
Billings vs. Hall, 7 Cal., 1.
19 Am. and Eng. Enc. of Law (2d Ed.), 168.

The decision of a State court in construing the statute can have no more binding force than the statute itself, and hence, if such decision should be deemed to become a part of the statute, the decision is equally with the statute, subject to subsequent change by a later decision, without impairing any vested right of the party to the contract, affected by such later decision, and therefore, we submit, the federal courts will, upon the subject of the statute of limitations, adhere to the rule, enunciated in the authorities we have mentioned, and follow the *latest decisions* of the highest court of the State respecting that statute.

Leffingwell vs Warren, 17 L. Ed. (U. S.), 261.
Balkam vs. Woodstock Iron Co., 38 L. Ed. (U. S.), 953.

As it must be admitted that the fund in the Mather case from which the bonds there were payable, was infinitely closer in resemblance to what, in contemplation of law, is called a "particular fund" than are the funds from which the bonds here are payable, and as the same reasons were advanced and the same authorities cited in the Mather case as were advanced and cited in the case at bar, in the District Court, we submit that the Mather case is decisive upon this case and the principle, so clearly upheld in the Mather case, respecting the running of the statute, *a fortiori* applies to the case at bar, where unquestionably the coupons are mere *general* obligations.

The Mather decision has been approved by this court since its rendition, and was cited and relied upon as

authority in the subsequent case of Shapter vs. San Francisco, 115 Fed., 1021, and it was also cited by the Circuit Court in Eddy vs. San Francisco, 148 Fed., 277, and by the California Supreme Court in Cal. Safe Dep. Co. vs. Sierra Co., 158 Cal., 690.

Doubtless, the learned District Court would have followed the Mather case but it was argued by our opponent that the particular fund doctrine "was not discussed" in that case and the court apparently, for that reason, did not give the decision the weight to which it was entitled. We have seen this idea was a fallacy, as the subject was thoroughly thrashed over in the briefs and the opinion of this court expressly refers to the fact that the bonds are payable "out of a special fund," and that they had not been paid by reason of the city being remiss in failing to provide such fund. (Page 42.) In any event, where a legal decision is made in an action, it would indeed be injecting a startling tenet into our system of jurisprudence, to hold that such a decision does not constitute a precedent and may be ignored in a later case, embracing similar questions, unless all the reasons for such decision are set forth in the opinion of the court.

Houston vs. Williams, 13 Cal., 24.

It is also very plain that the fact that the federal courts generally have no original jurisdiction in mandamus, constitutes no reason for holding that the statute has not run against the coupons in this case. It is obviously reasoning in a circle to say that although it must be conceded the statute would have run in a State court

against these coupons, yet, as in the federal courts, mandamus is not generally available before judgment, the statute is held in abeyance, and the cause of action on the coupons becomes thereby endued with eternal life—in fine, such a preposterous notion necessarily involves the proposition that no right to sue arises until the plaintiff is entitled to the writ of mandate. The mere statement of such an hypothesis carries with it its own refutation. We have seen that the "right to sue" is synonymous with the accrual of a cause of action, and that it is beyond controversy that the accrual of the cause of action synchronizes with the commencement of the running of the statute.

Amy vs. Dubuque, 25 L. Ed., (U. S.) 228.
Harrigan vs. Insurance Co., 128 Cal., 531.
McDaniel vs. Cherryvale, 136 Pac., 899.
Section 312, C. C. P.

If then, the defendant in error has not become vested with the "right to sue," let him march out of court. On the other hand, if he has acquired the right to sue, let him admit the inevitable result, which is the accrual of the cause of action and the consequent running of the statute. He cannot set at naught all principles and rules of common sense and logic and contend for a certain premiss, without at the same time subjecting himself to the effect of the unavoidable conclusions which the law, from time immemorial, has said shall flow from that premiss.

This extraordinary, specious and palpably unsound doctrine—that mandamus being unavailable to a plain-

tiff in the Federal Courts before judgment results in the statute not running—was argued in the trial court with sufficient force to "deceive the very elect" and, in answer to the plea that the action was barred by the statute, the learned court in his opinion rendered herein, says:

> "This argument, however forcible as to a suit in the State court, where mandamus may be resorted to in the first instance, cannot apply to one in the federal court, for the reason, that, in the latter court, mandamus is not available in the first instance, but only after the plaintiff's claim has been reduced to judgment.
>
> Under these circumstances, to hold that the statute begins to run against a suit in the federal court from the date when plaintiff's right to mandamus accrued in the State court, would be practically a denial of plaintiff's right to sue in the federal court, which unquestionably has jurisdiction over his controversy; in other words, it would be to hold, in effect, that federal jurisdiction can be ousted by State law.
>
> On this subject may be aptly quoted the following extract:
>
> "To hold that, because mandamus is available in the first instance in the State court, but not in the federal court, therefore plaintiff must sue in the former, would be to hold, in effect, that federal jurisdiction can be ousted by State law, which we know is not the case. (Lincoln Co. vs. Luning, 133 U. S., 529; Hyde vs. Stone, 20 How., 175; Suydam vs. Broadnax, 14 Pet., 67; Bank vs. Vaiden, 18 How., 503; Reagan vs. Trust Co., 154

U. S., 420.'') (Shepard vs. Tulare Irrigation District, 94 Fed., 4.)

I am of the opinion, that the case at bar falls under the particular fund doctrine declared by the Supreme Court in Lincoln County vs. Luning, 133 U. S., 529, and later by the Circuit Court of Appeals for this circuit in Robinson vs. Blaine County, 90 Fed., 63, 70. See also Freehill vs. Chamberlain, 65 Cal., 603.

The later cases of Mather vs. San Francisco, 115 Fed., 37, and Eddy vs. San Francisco, 162 Fed., 441, *are not conflicting authorities*, because in neither one of said cases is the particular fund doctrine discussed by the court.

Judgment will be entered for the plaintiffs, and their attorneys are requested to prepare suitable findings, and submit them to the court for its action after serving copies upon defendant's attorneys.

OLIN WELLBORN,
Judge.

We respectfully submit that the theories, contended for by our opponent and followed by the learned trial court, arise from failing to discriminate between a ''right'' and a ''remedy''—the latter being simply the means by which the obligation is enforced. (Frost vs. Witter, 132 Cal., 526; 34 Cyc., 1201.) What, we ask, has the remedy to do with the cause of action or its accrual? (See Frost vs. Witter, *supra*.) The pole star to guide us here, as to the question when the statute commenced to run, will be found in the determination respecting *the time the action accrued*, or in other words, when could the defendant in error have brought this suit? The learned court apparently failed to realize

that the defendant in error could have brought this suit upon the respective maturity dates of these coupons.

Whether the relief sought by a plaintiff be a money judgment, or a writ of mandate, concerns only the *remedy* and has nothing to do with *the cause of action*, which, in this case is the breach of the promise to pay these coupons. In Butler vs. Johnson, 111 N. Y., 204, in referring to the statute of limitations, says the New York Court of Appeals:

> "There can be no sense in enlarging the time by a mere change of the form of the remedy sought, where the subject matter of the action is precisely the same, and the remedy in either was adequate."

Young vs. Turner Co. (Oct. 1914) 48 Cal., Decisions 461 (advanced sheets), where the original complaint prayed for a specific performance of a contract and a supplemental complaint was filed *praying for a money judgment* on the same contract, the California Supreme Court said:

> "The supplemental complaint in this case related to a matter occurring after the commencement of the action *which concerned the remedy rather than the cause of action.*"

See also Meath vs. Phillips County, 27 L. Ed. (U. S.), 819.

It is too clear to require argument to show that this is not a case where the obligations sued on are only payable *when there are funds* and where the municipality has *prevented* such funds being raised and then required the creditor to look to the fund and *not to itself.*

On the contrary, these coupons are *general* obliga-

tions upon which immediately upon maturity, money judgments against the irrigation district itself could have been sued for *in any federal or other court* in California, regardless of the question as to whether the remedy of mandamus was available. If then, a judgment on the coupons is part of the necessary machinery in the federal courts before mandamus can be resorted to, it still cannot be gainsaid that there was no obstacle whatever to prevent the defendant in error bringing suit to obtain such judgment as soon as the coupons severally matured.

Mather vs. San Francisco, *supra.*

Cass Co. vs. Johnson, 24 L. Ed. (U. S.), 416.

Davenport vs. Dodge Co., 26 L. Ed., (U. S.) 1018.

Shapter vs. San Francisco, 110 Fed. 615, and 115 Fed., 1021.

Bates vs. Gregory, 89 Cal., 387.

Herring vs. Modesto Irr. Dist.. 95 Fed., 705.

We further submit that there is nothing in the situation presented in the case at bar, which for one moment justifies the idea that the plaintiff in error, claims or ever has claimed that the relief asked by the defendant in error is only obtainable in the State courts, thereby maintaining that the federal courts have no jurisdiction of this case, which would be equivalent to an attempt to oust the jurisdiction of those courts. All of the argument of the defendant in error in the trial court respecting the alleged ousting of the jurisdiction of the fed-

eral courts, is, we submit, beside the case and clearly a *petitio principii.*

What has the question in regard to the statute of limitations in this case to do with ousting the jurisdiction of the court?

We do not deny the right of the defendant in error to enter this court, but what we do confidently assert is, that if he postpones such entry until many years after his right to sue for a judgment has become ripe, he must, in common with other litigants, suffer the consequences established by law and not claim the benefit of any exception which the statute expressly withholds from a tardy plaintiff suing upon belated claims.

Sawyer vs. Colgan.

It has also been contended that the case of Sawyer vs. Colgan, 102 Cal., 283, supports the so-called "particular fund doctrine" and should rule such a case as the one at bar. The Sawyer case was one of the cases relied upon by the plaintiff in error, in the Mather case, and was cited as authority in his brief on file in this court. That this court had the soundest reasons, when considering the Mather case, for declining to follow the Sawyer case, clearly appears from an examination of the Sawyer case, and we submit, equally sound reasons exist for holding the Sawyer case entirely inapplicable to the case at bar.

In the Sawyer case, writ of mandate was prayed for against the State controller, commanding him to issue a warrant upon the State treasury for the amount due upon a bond, and the court said:

"The findings show that in 1890, for the first time, a surplus of about five hundred thousand dollars was received into the State treasury. Prior to that time the petitioner never could have maintained a mandate for the payment of his coupons, and this being so, of course, the statute of limitations is no bar to the proceeding. The words of the act, "not otherwise appropriated", cannot be taken to mean 'not heretofore otherwise appropriated.' * * * *

"No provision was made by the State for the payment of these bonds until the year 1889, and we are of the opinion, therefore, that the statute did not begin to run against the bonds or coupons until that time. If the petitioner had presented his coupons for payment prior to that time, his demand would have been refused on the ground that there were no funds. *He could not sue the State*, because there never was any act authorizing him to sue. 'His remedy—if remedy it may be called—still lay in the voluntary exercise of the taxing power of the State. In other words, the State, by reason of her sovereignty, *still held control of the question of payment* as to all its incidents of time, mode, and measure."

Sharp vs. Contra Costa County, 34 Cal., 284.

Rose vs. Estudillo, 39 Cal., 270, 275.

People vs. Miles, 56 Cal., 401.

Here again was a case where the cause of action had not accrued and consequently, the statute did not run. Like the case of Freehill vs. Chamberlain, *supra*, no right to mandamus would arise against Colgan, until the power of the State had been voluntarily exercised for

bringing the necessary funds into existence, and Sawyer *was precluded from suing the State*. This being the situation, there is no resemblance between the Sawyer case and this case and the remarks of the Kansas Supreme Court in Schoenhoeft vs. Kearny Co., 92 Pac., 1097, which we have already quoted and which refer to the Sawyer case are peculiarly apposite when that court says that the Sawyer case "certainly falls very short of establishing the doctrine contended for"—that doctrine being the "particular fund" doctrine and consequent immunity from the effect of the statute of limitations.

Unlike the cases of Sawyer vs. Colgan and Freehill vs. Chamberlain, where the plaintiffs had no remedy whatever, here, in the case at bar, a number of courses have been open to the defendant in error, ever since the maturity of these coupons, to-wit: (a) Upon their maturity, he could thereupon have sued on the coupons in the federal courts for a money judgment. (b) He could have done the same thing in the State courts. In such event, the absence or presence of funds would not have furnished any defense or affected the accrual of the cause of action. If no funds were available to pay such judgment, as soon as it was rendered in the State court, he could have obtained writ of mandate to compel levy of sufficient taxes to yield such fund, as such writ is available in the State courts after such judgment is rendered as well as before.

In Nevada National Bank vs. Supervisors, 5 Cal., App. Reports, 638, (District Court of Appeals for Third Appellate District of California) where a judgment had

been rendered on Irrigation District bonds, it is said in the syllabus:

> "Where the board of directors of an irrigation district have refused to levy an assessment to pay the interest on its bonded indebtedness, and the board of supervisors, after a petition therefor, have refused to levy such assessment, as provided by the Act of March 31, 1897, providing for the organization and government of irrigation districts, the superior court of the county in which the irrigation district is situated has jurisdiction to compel the levying of such assessment by the board of supervisors, in the absence of a showing that the office of its board of directors is not within the county. The presumptions are in favor of the jurisdiction of the court."

In its opinion rendered in that case, the court said:

> "It seems to be established by the authorities that the proper course to pursue when municipalities refuse to pay their bonds is by an action at law to establish the validity of the bonds and the amount due thereon, *and then to apply for a writ of mandate* to compel the proper authorities to raise what is required to satisfy the debt by the assessment and levy provided by statute. The following cases cited by respondent so hold: Heine vs. Commissioners, 19 Wall., 655; Herring vs. Modesto Irr. Dist., 95 Fed., 705, 710; Marra vs. San Jacinto and Pleasant Valley Irr. Dist., 131 Fed., 780, 789, and Board of Supervisors of Riverside County vs. Thompson, 122 Fed., 860 (59 C. C. A. 70.) The latter case was similar to the one at bar, involving the same statute, and from it the following quotation seems germane:

"The present proceeding is not a new action to establish the rights of the defendant in error as against other parties. It is a proceeding in the nature of an execution to enforce *the judgment already rendered*. The right of the defendant in error to call upon the board of directors to enforce the judgment was established in that judgment as well as his right to have recourse to the board of supervisors in case of the refusal or neglect of the board of directors to make the levy and assessment. Neither the board of directors nor the board of supervisors nor the taxpayers of the Perris Irrigation District can be heard to defend the present proceeding on any of the grounds litigated, or which might have been litigated, in the former action."

This decision has additional weight because the Supreme Court denied the petition to have the case heard by that court (p. 653.)

(c) Instead of bringing an action for a money judgment on these coupons, he could, without reducing his claims to judgment, have applied to the proper state court for a writ of mandamus, as his right to such remedy became complete, when the breach of the promise to pay occurred, and this mandate would have been available against the directors of the district to compel assessment to raise funds for paying these coupons, or, as we have seen, in the event of the neglect of the directors to levy such assessment, the writ would have been available anainst the county supervisors. (See Sec. 22, Wright Act—hereinbefore quoted from—Barnes vs. Glide, 117 Cal., 1; San Francisco Savings Union vs. Reclamation District, 144 Cal., 648.) The

last case holds that the right to mandamus becomes "complete and perfect upon the original refusal to pay the claims" (p. 648.) The amended complaint and supplemental complaint herein both allege refusal to pay these coupons (Trans., pgs. 28, 47,) and the court finds the issues in favor of the plaintiff. (Tr., p. 49.) However, demand and refusal are not essential in order to start the statute running here.

Barnes vs. Glide, 117 Cal., 1.

Bauserman vs. Blunt, 37 L. Ed. (U. S.), 316.

California Safe, Etc. Co. vs. Sierra Co., 158 Cal., 697.

Williams vs. Bergin, 116 Cal., 61.

Harrigan vs. Ins. Co., 128 Cal., 548.

Wittman vs. Board, 19 Cal. App., 231.

These features of the case at bar so very plainly distinguish it from such cases as the Sawyer and Freehill cases as to cause further comment regarding them superfluous.

Robertson vs. Blaine County.

The case of Robertson vs. Blaine Co., 90 Fed., 63, was also cited by our opponents and it was contended that this case was similar to the present case. That case was decided by this court, some years before the Mather case and was brought to recover judgment against Blaine County, on bonds issued by Alturas County. The law under which those bonds were issued to meet the payment of the bonds, provided for a special tax which was to be collected as other taxes were collected and was to constitute *a separate fund and which*

was to be used for no other purpose, and all of the taxable property of the county was pledged for such payment.

The defendant county pleaded the section of the Idaho statute of limitations, covering actions brought upon *contracts in writing*. It appeared that after the bonds had been issued by Alturas County, a law was passed fastening the liability for their payment upon Blaine County.

The defendant argued that such law did not create a new liability, but that it was the old liability of Alturas County and therefore, the statute of limitations had run against the bonds. In referring to this argument, this court admitted the accuracy of the conclusions contended for, provided the argument, respecting the supposed *contractual* liability of Blaine County, had been correct and said:

> "If this contention is sustained, it necessarily follows that as the bouds become due November 1, 1891, and more than five years elapsed from that date before the action was commenced, *the statute of limitations would apply.*"

The foregoing quotation contains a plain admission, which quadrates with the subsequent Mather case, that the statute would have run if the liability had been held a *contractual* one. This court however, held that the liability was not contractual, but one arising from operation of law, and consequently was an obligation *in the nature of a specialty* and hence the section of the statute of limitations pleaded did not apply. In other words,

the situation was just as though no plea of the statute had been interposed because the appropriate section had not been pleaded. This court said:

> "The liability or obligation of Blaine county to pay the bonds and coupons issued by Alturas county did not, and could not, arise *except by legislative action.*" * * * *
>
> "This debt, or obligation or whatever it may be called, *is in the nature of a specialty*, and, in our opinion, is not barred by the provisions of Section 4052 of the Revised Statutes of Idaho."
>
> But the statute does create the duty or obligation on Blaine county to pay the same, and "the obligation thereby imposed *is a specialty*,' *and is not within the provisions of limitations pleaded herein.* * *
>
> "Under the law of Idaho, the statute of limitations may run against a specialty. Section 4054; p. 437, Rev. Stat. Idaho, reads as follows: 'Within three years: (1) An action upon a liability created by statute, other than a penalty or forfeiture.' But this action was commenced *within less than three years* after the act making Blaine County liable for the indebtedness of Alturas County was passed." * * *
>
> "The liability of the defendant in either event is created by the statute, and the limitation, *and the only limitation which the defendant can plead*, must begin at or after that date, because that is the date when its liability first began."

The Court then says that "the views already expressed *are conclusive upon the questions involved herein.*"

It is obvious, as the court had already conclusively

decided, that upon the existing facts and circumstances the pleaded statute of limitations did not fit the case, the later remarks of the court regarding the particular fund doctrine, were dicta—or at least were not material to the decision. How could they be material when the court had already held that the statute of limitations had not run because the liability of the defendant was *created by statute*, and the Idaho law prescribes a term of three years, for the barring of such a liability and it was undeniable the action had been commenced within a period less than three years? If, as the court held, the liability was not a contractual one, it was, we respectfully submit, immaterial to ascertain what the decision should be, if the character of the liability had been what the court held it was not.

It will also be noted that Judge Hawley, in the Robertson case, cites for the support of the views he expresses, regarding the particular fund doctrine, such cases as Lincoln County vs. Luning, Freehill vs. Chamberlain and Sawyer vs. Colgan, all of which cases were cited to this court in the subsequent Mather case and which it declined there to follow and which we have seen are conspicuously dissimilar to the case at bar.

It is, we submit, impossible to see any valid reason for permitting the remarks in the Robertson case, respecting the particular fund doctrine, to upset the later Mather case, which latter case was a California case and has been repeatedly cited and relied upon as authority, and in which case, it was directly held,—and not by language constituting a discussion upon a collateral

question—upon the point being squarely presented to this court, that the statute would run against municipal bonds, and where too the identical Section 337, C. C. P., was pleaded as it is pleaded in the case at bar. What logical ground can possibly exist for saying the well settled doctrine, that the federal courts will follow the decisions of the highest State court, on the subject of the statutes of limitations, should be ignored or that when a cause of action accrues, it has no effect upon the statute of limitations, or that when the California statute provides that there shall be no exception to the operation of the statute, this court should make one? The Mather case harmonizes with the decisions of the Supreme Court of California, which we have mentioned, and with all rules of logic and common sense and should not now be overturned upon the theory that the earlier Robertson case is discordant therewith, when it is very clear that the Robertson case turned upon an altogether different question, and the language of Judge Hawley, cannot, we submit, be applied to such an entirely different state of facts, as exist in the case at bar.

In People vs. Winkler, 9 Cal., 234, the court said:

> "It is true that the language of that opinion, taken without reference to the circumstances of the case, would bear the construction contended for; but the rule is well settled, upon the soundest principles of reason, that the language of an opinion, in general, *must be held as referring to the particular case decided.*"

Furthermore, there is nothing in the Robertson or Luning cases, which suggests that either the Nevada or

Idaho statute of limitations contains any provision similar to section 312 of our Code of Civil Procedure, which we have previously quoted, and which provides that no unspecified exception shall be made to the operation of the statute, and if such statutory mandate does exist, it doubtless was not argued, hence what is said in the following cases would seem appropriate.

In Franklin vs. Merida, 35 Cal., 570, the court said:

> "In each the court merely stated what it considered to be the rule, and the latter case, as the report shows, was submitted without argument. Such cases are far from satisfactory, and *are not to be received as conclusive of the law.*"

In Ingraham vs. Gildermester, 2 Cal., 161, the court said:

> "Even if this court had given the construction mentioned to the act referred to, we would not be bound, on the doctrine of *stare decisis*, to follow it, *contravening*, *as it does*, *the plain letter of the statute.*"

See also Golden Gate Mill and Mining Co. vs. Hendy Machine Works, 82 Cal., 184, where the court says:

> "There is nothing to the contrary in Alpers vs. Schamel, 75 Cal., 590. If there were, the decision would be *in direct conflict with the statute and would have to be overruled.*"

In the syllabus in Cardenas vs. Miller, 108 Cal., 250, it is said:

> "The expression of opinion in the decision of a cause which is not necessary to a determination of the case ts to be regarded as a mere dictum, and,

> when it announces a doctrine which is inconsistent *with the plain meaning and effect of a statute, it cannot affect a subsequent decision* in accordance with the statute."

In Hart vs. Burnett, 15 Cal., 609, the court says:

> "The cases relied on were not decided, so far as the point we have been discussing goes—the leviable character of this title—upen 'solemn argument and mature deliberation;' and this seems to be one of the conditions by which Chancellor Kent qualifies the conclusive effect of the adjudication."

What is said in the foregoing cases is in point here, because it is clear that any decision on the subject of the statute of limitations, running counter to the Mather case, would also be in direct conflict with section 312, C. C. P.

Hewel vs. Hogin.

These authorities apply with equal force to the case of Hewel vs. Hogin, 3 Cal. App., 248, which was decided by the District Court of Appeals for the third appellate district of California, and which case lacks the weight which would have been accorded to it, if a petition for hearing the case had been denied by the California Supreme Court, as no such petition was filed.

That was a case where an application for a writ of mandate was made, commanding the treasurer of the Modesto Irrigation District to pay interest on bonds.

What is said in that case, to the effect that the statute will not run, is dictum, for the reason that the statute was not pleaded and the court simply held there was no

abuse of discretion on the part of the trial court, in refusing the application of the defendant to amend his answer by pleading the statute. The application was not made until the trial and until after the plaintiff *had rested his case*. The court cites Sawyer vs. Colgan as authority although the two cases are as far apart as the poles, for, as we have seen in the Sawyer case, the plaintiff was remediless and could not sue the State, and no action lay against the State Treasurer Colgan, until he had money in his hands, for otherwise, he would have been held liable to suit for failure to perform an impossibility, consequently, the cause of action did not accrue until the money came into his hands.

In Hewel vs. Hogin, the court also indulged the misapprehension that as the bonds were not barred by the statute, the interest coupons were also not barred, and cites Meyer vs. Porter in support of this error, which case we have seen, has not only been explained by this court, in the Mather case, but has been also explained and discredited by the California Supreme Court (158 Cal., 690) and everywhere else.

In 25 Cyc. 1103, the law relative to interest coupons is succinctly and correctly stated as follows:

> "Interest coupons of bonds, in the absence of some particular statute of limitations concerning them partake of the same nature as the bonds themselves and are subject to the same statute of limitations. But while this is true, it is held by the weight of authority that the right of action on the coupons accrues, and *the statute begins to run, at the respective dates of their own maturity, regard-*

> *less of the time when the bonds mature*, and whether the coupons have been detached and transferred or remain attached to the bond. It follows that if an installment of interest cannot be recovered by an action on the coupon, because barred by the statute, *it cannot be recovered along with the principal in an action on the bond.*''

See also Amy vs. Dubuque, 98 U. S., 470; 19 Am. and Eng. Enc. of Law (2nd Ed.), p. 205.

It is evident Hewel vs. Hogin is not a well considered case, as it is diametrically opposed to the decisions of the California Supreme Court (Barnes vs. Glide, 117 Cal., 1; San Francisco Sav. Union vs. Reclamation District, 144 Cal., 643, and other cases we have cited), and it is impossible to reconcile it with Section 312, C. C. P. The case is clearly merely an authority to the effect that there was no abuse of discretion by the trial court in refusing the amendment, setting up the statute, and the decision cannot be twisted into holding that a cause of action on principal and interest coupons, similar to those involved here, did not accrue when such coupons matured. We might add that in the case of Ham vs. Grapeland Irrigation District, which we have already mentioned, Judge B. F. Bledsoe (now U. S. District Judge) refused to follow the Hewel case upon the subject of the running of the statute, although it was cited to him by the plaintiff Ham; and Judge Oster, of the San Bernardino County Superior Court, in the case of Young vs. Allessandro Irrigation District, likewise refused to follow it.

Gasquet vs. Board.

The case of Gasquet vs. Board, etc. (La.) 12 South Rep., 506, is another case where the obligations were construed not to be *general* obligations, payable at a particular time, and where the court held that the holders of such obligations had no remedy to enforce payment, except when the funds, from which the obligations were payable, had been placed in the treasury—presenting a widely different case from this one, where the right to sue was complete upon the maturity of the coupons. In the Gasquet case, the court said:

> "Act of 1873 makes it very clear that the claims evidenced by these certificates *were not payable absolutely or at any particular time.* They are payable *only* out of the revenues of the years for which they are issued and only when said revenues are collected * * * The law deprived the claimants of *any legal remedy* to enforce payment, *except out of particular revenues, when actually collected* and converted into the treasury."

So we might go on multiplying decisions which furnish numerous illustrations of cases where, at first blush, the facts and principles applied, might appear to bear some resemblance to the facts in the case at bar, and to the principles applied by the lower court, but when a careful analysis is made of such cases they will all be found lacking in showing adequate reasons for destroying the underlying elements, imbedded in our jurisprudence upon the subject of the limitation of actions. Nor will such cases, we respectfully submit, be found to vindicate the illogical hypothesis that, where a

state code inhibits the engrafting of an exception upon the statute of limitations and expressly prescribes the period within which suit can be brought upon a written instrument, it is still permissible to bring such suit years after the expiration of the specified period and to excuse such conduct by contending that the action is *sui generis* in that either (1) the cause of action has not accrued and therefore the statute has not run, notwithstanding it is also claimed the action is not premature; or (2) that the cause of action has accrued, and still the statute does not run, which necessarily involves creating an exception, to the operation of the statute, violating the plain terms of the code and effacing every elementary rule upon the subject, as well as overturning a multitude of decisions to the contrary.

Distinction Between "Right" and "Remedy."

The unsound foundation upon which the entire fallacious theory of our opponents was attempted to be based is not far to seek. They became obsessed with the notion that the one and only reason, why the courts hold that the statute does run against such instruments as these, must be that as the writ of mandamus is generally available to the holder of such bonds, it enables him to compel the creation of the fund from which they are payable and precludes him from relying on the particular fund doctrine. So assuming, and also without warrant further assuming that these obligations were *special* obligations and payable *exclusively* from a fund —thus erroneously insisting that this was a "particular

fund'' case—it was then contended in the lower court that as the writ of mandate is not usually available in the federal court before judgment, the supposed reason for the decisions, which hold that the statute runs, is eliminated and that therefore the rule should fall with the supposed reason.

As we have already observed, these notions present a clear case of a confusion of ''right'' and ''remedy''. It may not be questioned that the right to sue *for a money judgment* arose promptly upon the maturity of the coupons and therefore, the cause of action *then accrued* regardless of whether the forum to be entered was a state or a federal court. Because a plaintiff is compelled to obtain a judgment in the federal court, before the writ of mandate will issue, is manifestly no obstacle to the accrual of the cause of action. After he gets his judgment he may never need his writ, as money may by that time, be in the fund. If the fact that, in the federal court, a judgment is a prerequisite to mandamus, could by any possibility be deemed to prevent the right to sue from arising, it is equally clear, in such event, that the plaintiff never could get into the federal court. Such an argument, of course, is tantamount to putting ''the cart before the horse'' and results in rendering a federal court judgment absolutely unattainable. On the other hand, if the fact of such judgment being a prerequisite to mandamus does not preclude the right to sue arising, it is useless to contend that the cause of action has not accrued.

It is also clear that the same reasoning applies to the

bringing of an action in the State court. In such case, the plaintiff, in the absence of funds in the defendant's hands, upon the maturity of coupons, has the option of applying immediately for a writ of mandamus or of immediately commencing action for a money judgment.

Nevada National Bank vs. Supervisors, 5 Cal., App. 638.

Barnes vs. Glide, 117 Cal. 1.

S. F. Savings Union vs. District, 144 Cal., 649.

Whichever course he follows, *the cause of action must necessarily have accrued* or otherwise he would be unable to sue for either remedy and the action would be premature. He cannot remain idle, after the coupons have matured, for an undeterminate period of perhaps fifty or one hundred years or more, and say his action is not accruing or has not accrued, for the reason that he should be entitled to an unlimited period within which to speculate as to whether funds will be provided by the defendant with which to pay his claims when he gets his judgment or writ.

It is true that in S. F. Savings Union vs. Reclamation District, 144 Cal., 649, the court said:

> "The only means by which the plaintiff could obtain payment of such a judgment would be by resort to the remedy which he had in the first instance,—that is to say, a suit in mandamus to compel the levying of an assessment whereby money could be raised with which to pay the same. But this remedy, as we have seen, has been long since barred."

It is equally true however, that this language cannot

for a moment lend any color to the absurd idea that the court was discussing anything except one thing, viz: the subject of "remedy"—not right, nor the accrual of the cause of action. The remedy, mentioned by the court, was available to that plaintiff either before or *after* judgment, as we have seen that the writ of mandamus will issue in the State court *after* as well as before judgment, and there is absolutely nothing in the language quoted to suggest the untenable notion that all remedies are denied to a holder of coupons by the State courts, except the one remedy of applying for mandamus *before* judgment. The fact that a municipal corporation generally owns no property which can be taken by execution has nothing to do with the question as to when a cause of action accrues. All these matters relate exclusively *to the remedy*, and do not preclude a plaintiff suing on coupons for a money judgment, in any court in the land, as soon as the instruments mature, and as the right to sue *then arises*, we respectfully submit, the statute *then commences to run*, from which conclusion there is no escape unless the California code and all elementary rules be obliterated.

If the statute can be held nullified by the ruse of bringing suit in the federal courts, upon the theory that as a judgment is there a prerequisite to a writ of mandate, the statute cannot run, such a doctrine would be simply thwarting the statute by "mere strategy of proceedings," which, of course, cannot be done.

In 19 Am. and Eng. Enc. of Law (2nd Ed), 153, it is said:

> "Neither the plaintiff nor the defendant will be allowed to thwart the 'beneficent and healthful effect of a statute of repose' by any 'mere strategy of legal proceedings.' "

The theory of our opponent in the trial court was something akin to the notion indulged by the creditors of an insolvent corporation, who brought suit against its stockholders, in the case of Glenn vs. Dorsheimer, 23 Fed., 695, and insisted that, as no call had been previously made on the stockholders the statute had not run.

The court held that the statute had run against these creditors, and that *the fact that a judgment should be first obtained before the call were made* constituted no reason for saying the statute had not run, because the obtaining of the judgment was within the power of such creditors, and Judge Brewer said:

> "These creditors *could have reduced their claims against the corporation to a judgment*, immediately after the assignment in 1866, through the simple processes of an ordinary action at law,*and then brought their bill* against the various stockholders to enforce payment here or elsewhere."

So also in Glenn vs. Priest, 28 Fed., 907, Judge Brewer said:

> "I cannot escape the conviction that *no mere strategy of legal proceedings* should enable a party to jump the lengthened space of eighteen years and destroy the beneficent and healthful effect of a statute of repose like the statute of limitations."

See also Glenn vs. Dorsheimer, 24 Fed., 536.

So we say here, there was no obstacle whatever existing in any court in the country, to prevent these coupons being reduced to judgment as they severally matured, and after recovering such judgment, its holder could have availed himself of any appropriate method which existed to obtain the payment of such judgment. If it afterwards transpired that mandamus proved to be the only means by which such payment could be consummated, such a contingency plainly would not affect the accrual of the cause of action, as how or by what method such payment is finally effected is something entirely irrelevant to the question of the accrual of the cause of action. This is most obvious because, before the judgment has been obtained, it is impossible to ascertain in advance what the conditions will be—whether the necessary funds will then be in the treasury; or if not, whether the directors of the irrigation district will promptly levy sufficient taxes to pay the judgment, without necessitating a resort to mandamus; or, if the directors refuse to levy such taxes, whether the supervisors of San Bernardino county will make the levy in accordance with the Wright Act, etc.

In brief, all such questions are immaterial before judgment is obtained, and in Herring vs. Modesto Irrigation District, 95 Fed., 705, where irrigation bonds were sued upon, the court expressly said:

> "It is immaterial, in determining the sufficiency of the complaint to consider *how the judgment in the suit may be enforced.*"

Other Decisions Holding Statute Runs.

In addition to the statute and authorities already cited, there is abundant authority, upholding the fundamental principle, that the time of the starting of the running of the statute concurs with the accrual of the cause of action, to some of which precedents we invite the attention of the court.

In Goldman vs. Conway County, 10 Fed., 888, where suit was brought on county warrants, the court said:

> "Where a county *is not liable to be sued on such warrants and cannot be coerced* to levy a tax for their payment, the statute probably would not run against them and the cases of Justices, etc. vs. Orr, 12 Ga., 137, and Carroll vs. Board, etc., 28 Miss., decided this and no more. But it is the settled law of this court that suit may be maintained on the class of warrants here sued on and that under Section 10 of the Article 16 of the Constitution of 1874, the county court may, by mandamus, be compelled to levy a tax not to exceed the limit prescribed by that section, to pay a judgment allowed thereon. Shirk vs. Polaski County, 4 Dillon, 209, and note. * * * It is no answer to say the treasury of the county *never contained funds* to pay the warrants. They were a legal tender in payment of taxes; and it was open to the plaintiff by appropriate judicial proceedings, to compel funds to be placed in the treasury for their payment and the right of action accrued when the warrants were issued and *not when there were funds in the treasury* for their payment. Where a contract was made for work, payable out of a public fund, it was held that a statute began to run from

the time the work was completed, *although the fund was not raised*—Emery vs. Day, 1 Compton M. and R. Ex. 245,"

In Crudup vs. Ramsey, 15 S. W. (Ark.), 458, it is said in the syllabus:

"Being payable on demand, the statute begins to run against the warrants *from their delivery.*"

In Bodman vs. Johnson County, (Ia.), 88 N. W., 331, the court said:

"We think the distinction between the cases is that in the latter (Wetmore case) the county *had no means* of raising the fund out of which the interest could be satisfied, and therefore was not in default in payment, until there was money on hand, while in the case of the ditch fund, there is authority for making additional assessments until the expenses payable out of the fund are satisfied. (See Code Sec. 1950). Therefore, *it was the duty of the county to raise the necessary funds, and plaintiff was not justified in postponing the bringing of his action* until such funds were actually on hand."

See also Thompson vs. Searcy Co., 57 Fed., 1036.

Wilson vs. Knox Co. (Mo.), 28 S. W., 897.

Pelton vs. Crawford, 10 Wis., 63.

Condon vs. City of Eureka Springs, 135 Fed., 566.

Bush vs. Stowell, 71 Penn., St. 208 (10 Am. Rep.), 694.

In Bauserman vs. Blunt, 37 L. Ed. (U. S.), 316, the court said:

"When a party knows that he has a cause of ac-

tion, it is his own fault if he does not avail himself of those means which the law provides for prosecuting his claim or instituting such proceedings as the law regards sufficient to preserve it," and

"A person cannot prevent the operation of the statute of limitations by delay in taking action incumbent upon him," and "to permit a long and indefinite postponement would tend to defeat the purpose of statutes of limitation, which are statutes of repose, founded on sound policy, and which should be so construed as to advance the policy they were designed to promote."

In Williams vs. Bergin, 116 Cal., 56, the court said:

"The rule is well settled that when the plaintiff's right of action depends upon some act which he has to perform preliminary to commencing suit, and he is under no restraint or disability in the performance of such act, he cannot suspend indefinitely the running of the statute of limitations by a delay in performing such preliminary act."

In Harrington vs. Ins. Co., 128 Cal., 531, in referring to the question when the cause of action of a creditor accrues, the California Supreme Court said:

"He cannot prevent the statute from running by failing to make the demand. (Ball vs. Keokuk, etc. Ry. Co., 62 Iowa, 751). Whenever he can, if he chooses, by the terms of the contract, commence an action, *the cause of action has accrued*, for the purposes of the statute. (Great Western Tel. Co. vs. Purdy, 83 Iowa, 430; Atchison, etc. R. R. vs. Burlingame, 36 Kan., 628, 59 Am. Rep. 578.")

In Wittman vs. Board, 19 Cal. App., 229, the court said:

> "Where a right has fully accrued except for some demand to be made as a conditioned precedent to legal relief, which the claimant can at any time make, if he so chooses, the *cause of action has accrued* for the purpose of setting the statute of limitations running." (Citing cases).

See also First Nat. Bank vs. King, 57 Pac. (Kas.), 952; Kulp vs. Kulp, 21 L. R. A. (Kas.), 550.

The interest and installment coupons set forth in the complaint, amended complaint and supplemented complaint, and sued upon in this case, which we claim to be barred, amount to *$23,282.00*.

The complaint was filed June 27, 1908. (Tr., p. 16). and the following is a list of the barred coupons sued upon in the complaint (Tr., p. 13) giving number of coupon, amount, date of maturity of each, number of coupons sued upon, and amounts barred, viz:

INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amouut Barred
9	$15.00	July 1, 1895	39	$585.00
10	15.00	Jan. 1, 1896	48	720.00
11	15.00	July 1, 1896	48	720.00
12	15.00	Jan. 1, 1897	48	720.00
13	15.00	July 1, 1897	48	720.00
14	15.00	Jan. 1, 1898	48	720.00
15	15.00	July 1, 1898	48	720.00
16	15.00	Jan. 1, 1899	48	720.00
17	15.00	July 1, 1899	48	720.00
18	15.00	Jan. 1, 1900	48	720.00
19	15.00	July 1, 1900	48	720.00

20	15.00	Jan. 1, 1901	48	720.00
21	15.00	July 1, 1901	48	720.00
22	15.00	Jan. 1, 1902	48	720.00
23	14.25	July 1, 1902	48	684.00
24	14.25	Jan. 1, 1903	48	684.00
25	13.35	July 1, 1903	48	640.80
26	13.35	Jan. 1, 1904	48	640.80
	Total.....			$12,594.60

INSTALLMENT COUPONS.

1	$25.00	Jan. 1, 1902	48	$1200.00
2	30.00	Jan. 1, 1903	48	1440.00
3	35.00	Jan. 1, 1904	48	1680.00
	Total.			$4320.00

Total amount of interest and installment coupons set forth original complaint that are barred..$16.914.60

On December 29th, 1909, an amended complaint was filed (Tr., p. 17.), involving the same interest and installment coupons.

On July 5th, 1912, a supplemental complaint was filed (Tr., p. 42), adding a third count and for the first time bringing into the action, the following interest and installment coupons:

INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Conpons Sued Upon	Amount Barred
8	$15.00	Jan. 1, 1895	3	$ 45.00
9	15.00	July 1, 1895	5	75.00
10	15.00	Jan. 1, 1896	4	60.00
11	15.00	July 1, 1896	4	60.00
12	15.00	Jan. 1, 1897	6	90.00
13	15.00	July 1, 1897	6	90.00

14	15.00	Jan. 1, 1898	6	90.00
15	15.00	July 1, 1898	6	90.00
16	15.00	Jan. 1, 1899	6	90.00
17	15.00	July 1, 1899	6	90.00
18	15.00	Jan. 1, 1900	6	90.00
19	15.00	July 1, 1900	6	90.00
20	15.00	Jan. 1, 1901	6	90.00
21	15.00	July 1, 1901	11	165.00
22	15.00	Jan. 1, 1902	11	165.00
23	14.25	July 1, 1902	11	156.75
24	14.25	Jan. 1, 1903	11	156.75
25	13.35	July 1, 1903	11	146.85
26	13.35	Jan. 1, 1904	11	146.85
27	12.30	July 1, 1904	11	135.30
28	12.30	Jan. 1, 1905	11	135.30
29	11.10	July 1, 1905	11	122.10
30	11.10	Jan. 1, 1906	11	122.10
31	9.75	July 1, 1906	11	107.25
32	9.75	Jan. 1, 1907	11	107.25
33	8.25	July 1, 1907	11	90.75
34	8.25	Jan. 1, 1908	11	90.75
35	6.60	July 1, 1908	59	389.40
	Total.....		.....	$3287.40

INSTALLMENT COUPONS.

1	$25.00	Jan. 1, 1902	11	275.00
2	30,00	Jan. 1, 1903	11	330.00
3	35.00	Jan. 1, 1904	11	385.00
4	40.00	Jan. 1, 1905	11	440.00
5	45.00	Jan. 1, 1906	11	495.00
6	50.00	Jan. 1, 1907	11	550.00
7	55.00	Jan. 1, 1908	11	605.00
	Total.....		.....	$3080.00

The total amount of interest and installment coupons

set forth in supplemental complaint that are barred amounts to $6,367.40, making the total amount barred as set forth in the original, amended and supplemental complaints, $23,282.00.

Cases No. 2492 and 2493

Under the stipulation filed in this action, and in cases No. 2492 and 2493, it has been agreed that cases 2492 and 2493 may be decided upon the record in this case No. 2491. (Tr., pg. 144-147.) An order of court has also been made in each of the cases No. 2492 and 2493, they each may be heard and determined upon the record and briefs in this case No. 2491 (Tr., pg. 149-150). All three cases are upon the same issue of bonds, but involve different coupons of such general issues. Practically, the same questions are involved in each of the three cases. If the statute of limitation is held to be applicable to the case at bar, then under the the stipulation and order of court above referred to, the judgment in case No. 2492 should be reduced by $61,759.85 on account of barred coupons sued upon in that case, and in case No. 2493 the judgment should be reduced by $4367.00 on account of barred coupons sued upon in that case.

In case No. 2492, the complaint was filed April 18, 1908, and involved interest coupons No. 32, 33 and 34, and installment coupons No. 6 and 7, attached to 191 bonds. An amended complaint was filed November 22, 1909, upon the same interest and installment coupons. None of these coupons sued upon in the complaint and amended complaint are barred. But on July 5, 1912, a

supplemental complaint was filed, which for the first time, brought into the action interest coupons Nos. 21 to 31, both inclusive, and Nos. 35 to 40, both inclusive, and installment coupons Nos. 1, 2, 3, 4, 5, 8, 9 and 10, attached to 191 bonds. All of the foregoing interest coupons sued upon in the supplemental complaint, except Nos. 36 to 40, both inclusive, and all of the installment coupons, except Nos. 8, 9 and 10, were barred at the time of the filing of the supplemental complaint.

The following is a list of the barred coupons sued upon in the supplemental complaint in case No. 2492, giving number of coupon, amount, date of maturity of each, number of coupon sued upon and amount barred, viz:—

INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amount Barred
21	$15.00	July 1, 1901	191	$2865.00
22	15.00	Jan. 1, 1902	191	2865.00
23	14.25	July 1, 1902	191	2721.75
24	14.25	Jan. 1, 1903	191	2721.75
25	13.35	July 1, 1903	191	2549.85
26	13.35	Jan. 1, 1904	191	2549.85
27	12.30	July 1, 1904	191	2349.30
28	12.30	Jan. 1, 1905	191	2349.30
29	11.10	July 1, 1905	191	2120.10
30	11.10	Jan. 1, 1906	191	2120.10
31	9.75	July 1, 1906	191	1862.25
35	6.60	Jan. 1, 1907	191	1260.60
Total				$28,334.85

INSTALLMENT COUPONS.

1	$25.00	Jan. 1, 1902	191	$4775.00
2	30.00	Jan. 1, 1903	191	5730.00
3	35.00	Jan. 1, 1904	191	6685.00
4	40.00	Jan. 1. 1905	191	7640.00
5	45.00	Jan. 1, 1906	191	8595.00

Total.....$33,425.00

Making a total of $61,759.85 of interest and installment coupons barred in the case No. 2492.

Case No. 2493.

The complaint in this case was filed December 31st, 1910, and involved interest coupons No. 32 to 39, both inclusive, and installment coupons No. 6, 7, 8 and 9 attached to ten bonds.

An amended complaint was filed December 21st, 1911, and there was added to the cause of action interest coupons No. 13 to 31, both inclusive, and installment coupons, No. 1 to 5, both inclusive, on ten bonds.

All of the added installment and interest coupons sued upon in the amended complaint are barred.

A tabulated statement thereof being as follows:

INTEREST COUPONS.

Coupon No.	Amount	Date of Maturity	No. of Coupons Sued Upon	Amount Barred
13	$15.00	July 1, 1897	10	$150.00
14	15.00	Jan. 1, 1898	10	150.00
15	15.00	July 1, 1898	10	150.00
16	15.00	Jan. 1, 1899	10	150.00
17	15.00	July 1, 1899	10	150.00
18	15.00	Jan. 1, 1900	10	150.00
19	15.00	July 1, 1900	10	150.00
20	15.00	Jan. 1, 1901	10	150.00

21	15.00	July 1, 1901	10	150.00
22	15.00	Jan. 1, 1902	10	150.00
23	14.25	July 1, 1902	10	142.25
24	14·25	Jan. 1, 1903	10	142.25
25	13.35	July 1, 1903	10	133.50
26	13.35	Jan. 1, 1904	10	133.50
27	12.30	July 1, 1904	10	123.00
28	12.30	Jan. 1, 1905	10	123.00
29	11.10	July 1, 1905	10	111.00
30	11.10	Jan. 1, 1906	10	111.00
31	9.75	July 1, 1906	10	97.50
	Total			$2617.00

INSTALLMENT COUPONS.

1	$25.00	Jan. 1, 1902	10	$250.00
2	30.00	Jan. 1, 1903	10	300.00
3	35.00	Jan. 1, 1904	10	350.00
4	40.00	Jan. 1, 1905	10	400.00
5	45.00	Jan. 1, 1906	10	450.00
	Total			$1750.00

Making a total of $4367.00 of interest and installment coupons barred in case No. 2493.

Point II.

The court erred in rendering said judgment for the reason that none of the bonds bore date at the time of their issue, as required by the statute authorizing the issue of bonds by plaintiff in error, and none of said bonds ran, by their terms, for the length of time they were required to run by the provisions of said statute (Subdi-

visions (a) and (b) and (g) of Specification 9, Tr., p. 129.)

The stipulation, entered into by the parties in this action, covering certain facts agreed upon, is set forth on page 52 of the transcript, and among other things recites:

> "That the first delivery of bonds made by said district was made to the Semi-Tropic Land and Water Company, in December, 1890, being a delivery of three hundred bonds, and being bonds numbered one to three hundred inclusive; that *the next delivery of bonds made by said District was made in May, 1892, or shortly thereafter*, under the contract of date May ——, 1892, hereinafter set forth."

None of the bonds to which belonged the coupons herein sued upon, with the exception of three bonds numbered 77, 78 and 234, were embraced within the three hundred bonds delivered in December, 1890. (Trans., pgs. 26, 45,) and, with respect to the three bonds mentioned, it is plain even they were not delivered upon the date they bore, as every bond was dated November 17th, 1890. (Tr., p. 22.) All of the other bonds sued upon herein were delivered long after the date they bore, as appears from the stipulation quoted.

The Wright Act, as we have seen, is a mandatory one and section 15 thereof (Cal. Stat., 1887, p. 36) provides that the bonds "shall be numbered consecutively as issued, and *bear date at the time of their issue*."

The question arises as to the meaning of the words "issue" and "issued" as used in the Wright Act.

Respecting this question, in Sechrist vs. District, 129 Cal., 640, the California Supreme Court said:

> "But it cannot be maintained that the bonds were issued, in the sense of the statute, until they were *delivered for a valuable consideration*. It was said in Brownell vs. Greenwich, 114 N. Y., 518, speaking of certain bonds in litigation: 'They bear the date of March 25, 1871, and are presumed to have been executed at that time, but executing is not issuing, for they may be fully executed *but never issued*. * * * The bonds had no legal inception, and could not become valid obligations, aside from any other question, *until actually delivered for a valuable consideration*. Under the circumstances, we think that the delivery of the bonds to the plaintiff *determines the date* when his bonds were *issued*. The Wright Act provides in section 15 that the 'bonds shall be numbered consecutively *as issued* and bear date *at the time of their issue*; and section 16 provides that 'the board shall sell said bonds *from time to time*, in such quantities as may be necessary and most advantageous, to raise money for the construction of said canals and works, the acquisition of said property and rights, etc. These provisions clearly contemplate *successive acts* which *from time to time* may require *the issue of bonds as the work progresses*.'"

See also Wright vs. East Riverside Irr. District, 138 Fed., 315, in which case Judge Wellborn held in the lower court that the bonds there involved were issued when delivered. Austin vs. Valle, 71 S. W. Rep., p. 414; Clark vs. Los Angeles, 150 Cal., 46; Merced

River Electric Co. vs. Curry, 157 Cal., 727; Connelly San Francisco, 164 Cal., 101.

If then the time of delivery is the time of the issuance of the bond, it is plain that the term during which the bond shall run is intended by the legislature to commence at the date of its issuance, as that is the date which the statute says the bond shall bear, and yet every bond here specifies that the date of its maturity shall be so many years *from its date*, which date was long prior to its issuance. If the period of maturity, by the system of antedating can be legally shortened to this extent, it would be equally permissible to have issued these bonds one day before the date of maturity, by causing them to bear a date a sufficient number of years prior to the specified time of maturity. It is apparent the legislature never intended that an irrigation district should be subjected to the burden of having to pay a bond one day after its issuance.

Ordinarily a bond or note, in order to be valid, is not required to be truly dated, or even dated at all; nor to be in any particular form, negotiable or not negotiable; nor to run for any specified term. But the defendant has *no power* to issue bonds, except as derived from the Wright Act; and that act expressly provides that the bonds therein authorized *shall* "bear date at the time of their issue," and that they *shall* run for a specified term. These provisions are limitations upon the power granted. The defendant is authorized to issue only such bonds as are provided for by the statute. The amount, in number and value, may be determined by

the district; and the form, in so far as not inconsistent with the statute or general law, is discretionary; but in so far as the form is prescribed, there is no room for discretion, *no power* but to follow the requirement.

In Anthony vs. County of Jasper, 101 U. S., 697, a suit upon interest coupons by an innocent holder, the court said:

> "The can be no doubt that it is within the power of a State to *prescribe the form* in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability. * * * As against a bona fide holder, the public is bound by what its authorized agents have done and stated *in the prescribed form*. Dealers in municipal bonds are *charged with notice* of the laws of the State granting power to make the bonds they find on the market. This we have always held."

In People's Bank vs. School District, 3 N. Dak., 496 (28 L. R. A., 644), bonds had been issued under a statute authorizing their issuance for a term not less than ten years, but the bonds in question, by their terms, ran for eleven days less than ten years. The bonds were held void for want of power to issue them. The court said:

> "It is elementary that power to issue such municipal securities is derived wholly from statute. The statute may *prescribe the conditions* on which such power shall be exercised. It may also declare *what terms shall be embodied in the bonds* it authorizes to be issued. The donee of the power must take it burdened with all the statutory require-

ments, as well with respect to the *terms* of the bonds to be issued as with regard to the conditions on which they may be issued. The statute authorizing defendant to issue bonds provides that they 'may be made payable in not less than ten nor more than twenty years from their date.' The bonds which were issued under this power were dated September 12, 1884, and were in terms payable September 1, 1894. They were therefore, made payable in less than ten years from their date. We do not see how such a bond can be regarded as being *authorized* by the statute. There is no more *power* to issue bonds payable eleven days less than ten years from date than nine years less. If the question is to depend upon the magnitude of the departure from the statutory requirement, it will be impossible to know where to draw the line. If we ought not to draw it at the period of eleven days, on what principle can we draw it at thirty days, or six months, or a year? Authority to issue bonds payable in not less than ten years from date is not authority to issue them payable *in less* than ten years. * * * Plaintiff cannot derive any benefit from its claim that it is an innocent purchaser, because, under all the authorities, even bona fide purchasers of such securities are charged with knowledge of the terms of the statute under which the bonds are issued."

The principle declared in that case would have been the same whether the bonds had run eleven days less than ten years or eleven days more than ten years. The defendant simply had no authority, no power, to make them for either a shorter or a longer term than that prescribed in the statute.

In Norton vs. Town of Dyersburg, 127 U. S., 160, bonds had been issued payable in ten years from date, which was a *longer* period than that authorized by the statute. They were held void for that reason.

In Barnum vs. Okolona, 148 U. S., 393, the statute authorized the issue of bonds, to run not more than ten years. Bonds were issued (apparently under an honest misconception of the law applicable), to run from eleven to seventeen years. All were held void, as being in excess of the power granted, and without reference to the magnitude of the departure. The court, referring to the provision of the statute that they should run not exceeding ten years, said that "such limitation must be regarded as in the nature of a *restriction on the power* to issue bonds;" and in conclusion said:

> "Our conclusion, upon the whole case, is that the Town of Okolona had *no power* to issue the bonds in suit."

And in the opening paragraph of the opinion in that case, the court declared the general rule, as follows:

> "That municipal corporations have *no power* to issue bonds in aid of a railroad, except by legislative permission; that the legislature, in granting permission to a municipality to issue its bonds in aid of a railroad, may impose such conditions as it may choose; and that such legislative permission does not carry with it *authority* to issue negotiable bonds except *subject to the restrictions and conditions* of the enabling act,—are propositions so well settled by frequent decisions of this court, that we need not pause to consider them."

Under the Wright Act, the defendant was authorized to issue bonds that should bear date *at the time of their issue*, that should be negotiable in form, and be made payable in a specified time. The defendant had no authority to issue any other kind or form of bond. The true date was by statute made an *essential part* of the form of the bond. As the bond was to run for a specified term, neither more nor less, from the time of issue, a false date would vary that term, would make it shorter or longer than the statute prescribed. If the defendant had power to insert a false date in the bond, then it would have power, by falsely dating the bond, to make it run from the time of issue, for either a shorter or a longer term than that prescribed—a power that the statute clearly did not intend to grant.

In the case of Wright vs. East Riverside Irrigation District, 138 Fed., 322, before this Circuit Court of Appeals, the bonds involved bore date at the time of their authorization, but were not disposed of till later. It was contended by the plaintiff that the bonds were issued when authorized by the resolution, and by the defendant that they were not issued until disposed of. After holding that the bonds *if* regarded as issued at the time of their date, were void because not signed by the proper person as secretary, the court said:

> "On the other hand, treating the bonds as having been issued at the time of their disposal, and when McCully was in fact secretary, they equally failed to conform to those other *essential provisions* of the statute, declaring they shall *bear date at the time of their issue*, and be payable in installments *at*

the various times therein fixed. In that view, they are ante-dated, the *direct and necessary effect of which* is to make them payable within a *shorter time than is provided by the statute* for their payment, which provision is, as a matter of course, of the *essence of the law, and not a mere matter of form.*''

These conclusions are merely based on general law, and by greater reason they are applicable in the case at bar, where they are supported by a mandatory statute, declaring ''absolutely void'' all bonds issued ''in excess of the express provisions of the act.'' (Sec. 42.) These bonds are not only issued in excess of those provisions, but in flagrant violation of them.

It will also be noted that these bonds upon their face, recite that ''the said bonds are by said act of the legislature, *made a lien upon all said real property.*'' (Tr., p. 22,) and Section 12 of the Wright Act provides that, if the district purchases property of a specified character, the bonds may ''be used at their par value *in payment.*''

In case of O'Neill vs. Yellowstone Irrigation District (Mont.), 121 Pac., 283, the Montana Supreme Court said:

> ''It is said that the word ''issued,'' as used in the statute, has reference to the date of actual delivery to the purchaser, and hence the view contended for must obtain. We agree with counsel that the word ''issue,'' as here used, means the delivery of the bonds to the purchaser, and has no reference to the arbitrary date fixed as the beginning of the time for which they run. The word ''issue,'' used in connection with bonds, notes,

> etc., sometimes, and perhaps generally, refers to this date; but *evidently bonds cannot be a lien upon the property of the obligor until they have been delivered, nor can they be issued directly in payment and in satisfaction of a contract without actual delivery.* Hence we conclude that the term, as here used, refers *to the actual delivery* or emission of the evidences of indebtedness."

It will also be noted that the Wright Act provides that "the board may sell said bonds *from time to time*, in such quantities as may be necessary and most advantageous, to raise money," etc., which clearly contemplates the delivery of bonds at different dates, and section 42 of the act also provides that "the board of directors, or other officers of the district, shall have no power to incur any debt or liability whatever, either by *issuing* bonds, or otherwise, in excess of the express provisions of this act," etc.

Now it would be impossible to incur liability, by *issuing* bonds, if they were not delivered—clearly showing that the word "issuing," as used in the act, is used in the usual and well accepted sense and embraces delivery of the bonds.

Although the bonds involved in the case of Stowell vs. Rialto Irrigation District, 155 Cal., 222, were held valid upon the facts as then presented, and the dates upon the coupons were held in harmony with the term specified by law, during which the bonds should run, thus overcoming the nominal date stated in the bond itself, yet the particular question here involved was not apparently considered and decided by the court, as the

court there considered the question whether those bonds *were void upon their face* by reason of the discrepancy existing between date of the coupons and the date of the bond, as appears (page 221) from the following language:

> "The respondent makes the further contention that apart from the manner in which they were exchanged, the bonds are *void upon their face*."

The court then proceeds to the consideration of *that question*, but the court also recognizes the rule that where the statute has fixed the term for which the bonds shall run, bonds, in which payment is undertaken at the expiration of a shorter period, are invalid and the court says:

> "The power of public corporations to issue bonds is to be exercised in the manner prescribed by statute. 'There can be no doubt that it is within the power of a State to prescribe the form in which municipal bonds shall be executed in order to bind the public for their payment. If not so executed they create no legal liability.' (Anthony vs. County of Jasper, 101 U. S., 693.) *Where the statute has fixed the term for which bonds shall run, bonds in which payment is undertaken at the expiration of either a shorter* (People's Bank vs. School District, 3 N. Dak., 496), (57 N. W., 787), *or a longer term* (Norton vs. Town of Dyersburg, 127 U. S., 160;) Barnum vs. Okolona, 148 U. S., 393; (13 Sup. Ct., 638), than that authorized are invalid."
>
> Stowell vs. Rialto Irr. Dist., 155 Cal., 222-223.

It will be seen that in the Stowell case, the court does not discuss the question, as to whether such bonds can

be sold and delivered years after the date they bear and still be valid obligations of an irrigation district, notwithstanding such antedating.

Apparently, many of these bonds were not in existence until after January 1st, 1891, for the defendant in error testifies that he waited for the bonds "till away in January. They didn't get them printed till January, ready for delivery and so I didn't get them in advance", etc. (Tr., p. 64).

On pages 56, 57 and 60 of the transcript appears a statement of the different times of the various deliveries of the bonds.

Point III.

The court erred in rendering said judgment and findings herein, for the reason that many of the bonds were issued for a consideration which, wholly or in great part, consisted in the doing of construction work for the defendant in error and for the reason that none of said bonds was ever lawfully issued. (Subdivisions (e), (f), and (h) of Specification 9—Trans., pgs. 129, 130.)

Some of these bonds were delivered to the defendant in error under his contract made by him with the district on Jan. 2nd, 1895. (Tr., p. 57.)

A copy of this contract is set forth on pages 115 to 118 of the transcript. It will be seen that this contract provides that:

> "Upon each $5000 worth of pipe when made at yard there shall be paid said Stowell $3000 in bonds at par. Thirty-five days after the completion of laying of each successive mile of pipe, the balance

due upon such mile shall be paid.'' (Trans., p. 117.) * * *

''IT IS UNDERSTOOD AND AGREED that all pipe heretofore furnished or constructed, or to be furnished or constructed for the Rialto Irrigation District or pipe system, and not heretofore deeded to said district, *shall remain and be, the property of N. W. Stowell* until the bonds received, or to be received therefor, shall have been paid.'' (Tr. p. 118.)

These provisions clearly show that the district was to issue bonds to the defendant in error, in installments, under this contract, to be applied on account of this material, viz: the pipe he was making. In fine, it is undeniable, that under this contract the district issued bonds to the defendant in error, *before it received the consideration therefor.* This feature brings the case within such precedents as Hughson vs. Crane, 115 Cal., 404; Stimson vs. Alessandro Irrig. Dist., 135 Cal., 389; Leeman vs. Perris Irr. Dist., 140 Cal., 540. These cases are unshaken by the case of Stowell vs. Rialto Irr. Dist., 155 Cal., 215. The last case differentiated the situation there existing from the precedents mentioned, upon the theory that in the Stowell case, the bonds were issued for completed structures and other property and *contemporaneously with the passage of the title to that property to the Irrigation District*, and referring to this, the Court says:

''So long as it did not *issue* any bonds *until it received, as consideration therefor*, the property which it had a right to buy for bonds, we see no objection to a contract by which it bound itself, in the fu-

> ture, to take and pay for water-rights not yet developed and works not completed at the date of the contract. By the use of the words "works constructed and being constructed" the legislature clearly indicated its intention to authorize districts to negotiate for water systems in advance of their total completion. In no event was their any obligation under this agreement to accept anything but developed water-rights and completed pipe-lines, nor a duty to deliver bonds *except upon transfer of such rights and lines.*"

The court was, in the last quotation, referring to the contract made by the district with the Semi-Tropic Land and Water Co. (See Tr., pgs. 73, 83.) It is clear therefore that the decision is no authority upon any proposition decided in the precedents we have cited. It will also be noted that in the last quotation the word "issue" bears the meaning for which we contend.

Under this contract of January 2nd, 1895, (made by the defendant in error with the district (Tr., p. 115), in violation of the provisions of the Wright Act, the district issued bonds *before* it received any property therefor and it became its duty to deliver those bonds *before* any transfer of such property was made to the district. We submit, therefore, that all of such bonds, so issued, were void. These bonds are sued upon in the case at bar and in order to prevent all of the bonds, herein sued upon, being held void, it is incumbent upon the defendant in error to plainly segregate the bonds issued under the contract mentioned, prior to delivery of the property therein contracted for. (See Edwards vs. Bates

County, 117 Fed., 533.) These particular bonds were not only wrongly dated but were issued in such a manner that they are void under the decisions mentioned for additional reasons (See Hughson vs. Crane, *supra*; Stimson vs. Alessandro, *supra*, and Leeman vs. Perris Irr. Dist., *supra*.)

It would also plainly appear here that under this mandatory enabling act, these bonds, if originally invalidly issued, remain void in the hands of every holder, regardless of the circumstances under which they were acquired.

These Bonds are Void and Unenforceable, Regardless of How the Holder Acquired Them.

We again invite the attention of this court to the stringent and mandatory provisions of section 42 of the Wright Act (statutes 1887, p. 44), wherein the legislature, in no uncertain terms, provides that:

> "The board of directors, or other officers of the district, *shall have no power* to incur any debt or liability whatever, either by issuing bonds, or otherwise, *in excess of the express provisions* of this act, and any debt or liability incurred, in excess of such express provisions, *shall be and remain absolutely void.*"

It is obvious—and the English language could not express anything more clearly—that by these provisions the directors of an irrigation district are unequivocally shorn of all *power* to issue bonds, or incur any liability whatever, except as provided by the act, and in the event of their attempting to incur any liability in excess

of those provisions, it is further clearly specified that such liability "shall be and *remain* absolutely void." Let it be noted this is not a declaration merely that such liability shall, at the time of its being incurred, be absolutely void, but the legislature *ex industria* use the word "remain" and expressly declare that such liability shall *remain absolutely void*. Here we submit there is no room for construction, as the legislature has spoken so clearly and has reiterated the same statement in the subsequent amendments to that act (see statutes 1891, p. 147, and 1897, p. 275.) The word "remain" is defined in the International Encyclopaedic Dictionary as follows: "To *continue* or *endure*, in a particular state, form or condition; to continue or *endure* generally; to survive."

Notwithstanding such distinct language, the learned trial court in effect held that the permanent result of transgressing the limitations of the act, so transparently dictated by the legislature, would not follow at all, provided the void bond were transferred to a person without notice of its infirmity. Such reasoning irresistibly leads into an intellectual fog. In other words, it is nothing more nor less than asserting that a thing, which has been expressly and *permanently* deprived of life by the fiat of the legislature. will spring into life upon being transferred to a new holder; it is nothing more nor less than saying that the word "remain" does not convey the meaning alike attributed to it by the lexicographer and by the wayfaring man, viz: the state of *enduring*, *continuing*, or *surviving*, but, on the contrary,

it should be interpreted to mean just the opposite. There is no escape from such an illogical position, for how can it be said that voidness *endures* or *continues* if a transfer ends it? or that it *survives* such transfer if such state of voidness is, in the hands of a transferee, turned into a state of validity? or how can it be said that a thing *remains* "absolutely void" if it is void in the hands of one person and valid in the hands of another?

It will be seen that section 42 of the Wright Act is undeniably a curtailment of the *power* of an irrigation district, as that section specifically provides that the directors "shall have *no power*" to transcend to inhibition. It will not do, therefore, to argue that an infraction of this clause is a mere "irregularity;" on the contrary, it is a question of *want of power*, and whenever the district attempts to overstep the circumscribed area, within which it is permitted and only permitted by this enabling act, to exercise the limited powers conferred upon it, then, by the express terms of the statute, it is palpably and distinctly confronted by *lack of power*.

We respectfully submit that although it may sometimes be difficult to distinguish the difference between what is an "irregularity" in the exercise of power conferred, and what constitutes "want of power," yet with reference to the Wright Act, it is clear no such difficulty can arise, because the legislature has so unmistakably manifested what its intention was in the premises, and has unequivocally said that an irrigation district *has no power* to issue bonds by the method or in the manner under which these bonds were issued, and that bonds so

issued are not only absolutely void when issued, but shall thereafter *remain* absolutely void, and the inevitable result therefore is that, under this statute, the defendant in error is precluded from seeking refuge behind the theory that he is a purchaser for value without notice of any irregularity in the issuance of these bonds, because this is not a case of "irregularity," but a case where there is *a total want of power* to do what section 42 of this enabling act says the district "shall have *no power*" to do.

In the case of Sutro vs. Petit, 74 Cal., 332, the bonds there involved disclosed on their face, nothing to indicate invalidity and the plaintiff appears to have been a bona fide purchaser for value. Interest had been paid on those bonds for about thirteen years and the bonds there, as here, referred to the act under which they were issued. The court said:

> "The power to issue the bonds, and the limitation of that power, depend wholly upon the *language of the act itself*, and not upon any extrinsic contingency. There was nothing left to the discretion of the officers, as in the case of Porter vs. Haight, 45 Cal., 631, nor was there any authority to do what 'might appear to them advantageous to the county,' as in Nevada Bank vs. Steinmitz, 64 Cal., 301.
>
> "*Neither can the doctrine of estoppel*, or of ratification, or of bona fide holding, be successfully invoked by respondents. Those doctrines can be invoked against municipal corporations—if at all—*only* in cases of informality, irregularity, etc., on the part of an authorized agent. (Dillon on Municipal Corporations, 3d ed., secs. 457, 463, 511-

553, and cases cited). Where there is a total *want of authority* to issue municipal bonds, there *can be no bona fide holding of them.*' (Town of East Oakland vs. Skinner, 94 U. S., 255.) It is clear —in this State at least—that the issuance of bonds is not within the scope of the general and ordinary powers of a board of supervisors, and that such bonds can be legally issued only by virtue of express authority of the legislature. (Dillon on Municipal Corporations, Secs. 485, 507, and cases there cited; Lindon vs. Case, 46 Cal., 172; Wallace vs. Mayor of San Jose, 29 Cal., 181; El Dorado County vs. Davidson, 30 Cal., 521; Robinson vs. Supervisors of Sacramento, 16 Cal., 208; Foster vs. Coleman, 10 Cal., 281; People vs. Supervisors of El Dorado County, 11 Cal., 170.) The bonds in question, therefore, were issued without any authority at all, and are wholly void. And the action of the board of May 4, 1885, ordering these bonds to be redeemed, was of course, of no value. The character of one void act of public officers cannot be changed by a second void act of the same officers, declaring the first act to be valid.

"It is quite probable that the respondents paid full par value for these bonds, and that they will lose their money. But 'those who contract with a municipal corporation are bound to know the extent of the power of its officers.' (Wallace vs. Mayor of San Jose, *supra.*) Respondents would have discovered the worthlessness of the bonds upon the slightest inquiry. At all events, hard cases cannot be allowed to make bad law. An over-issue of twenty thousand dollars would have been no less valid than the over-issue of two thousand

> dollars; and any other rule would put the people of a county in the complete power of careless or unscrupulous public officers."
>
> Sutro vs. Pettit, 74 Cal., 336, 337.

It will be observed in that case, the court points out there was by the act there involved, nothing left to the discretion of the county officers, but the power depended wholly upon the language of the act itself; this we submit, is the precise situation in the case at bar, for it is patent the power of an irrigation district to issue bonds is limited by the Wright Act. The directors of such district are not vested with any discretion to determine any extrinsic fact whatever, but are only able to exercise certain powers, for certain purposes, under express restrictions, and the "mode is the measure of the power" so given.

> "Where the act authortzing a town to borrow money to pay for the stock subscribed expressly provided that the officers thereof should '*have no power*' to do so until the written assent of two-thirds of the resident taxpayers had been obtained, this was held by the Court of Appeals of New York to be a condition precedent, without which the power did not exist."
>
> Dillon on Municipal Corporations (4th Ed.), section 550.
>
> "If the statute authorizes such a corporation to issue its bonds *only* when the measure is sanctioned by a majority of the voters, bonds issued without such a sanction (either in fact, or according to the decision of authorized officers, or some authorized body or tribunal), or when voted to one corporation

and without authority of law, issued to another, are void, *into whosoever hands they may come.* This is the sound and true rule of law on this subject, and the one which has had the uniform approval of the State courts in this country, and it has also received the high sanction of the Supreme Court of the United States. The distinction, however, must be remembered, between *want of power* to issue the bonds and *irregularities* in the exercise of the power, which latter are unavailing against the bona fide holder without notice of the irregularity.

Dillon on Municipal Corporations (4th Ed.), section 553.

See also McCoy vs. Briant, 53 Cal., 247.

Lehman vs. City of San Diego, 73 Fed., 108.

Hewit vs. Normal School District, 94 Ill., 531.

We reiterate that there was here no mere "irregularity in the exercise of power" on the part of the appellant in issuing these bonds, as it is obvious that to so hold would be indulging in a legal solecism, for how can there be an irregularity *in the exercise of a power*, which alleged power section 42 of the enabling act distinctly declares is non-existent?

See Wells vs. Supervisors, 26 L. Ed., (U. S.) 124.

And Barnum vs. Okolona., 37 L.Ed., (U. S.) 497.

In Marsh vs. Fulton County, 19 L. Ed., (U. S.) 1042, the U. S. Supreme Court said:

"But it is earnestly contended that the plaintiff was an innocent purchaser of the bonds without notice of their invalidity. If such were the fact,

we do not perceive how it could affect the validity of the County of Fulton. This is not a case where the party executing the instruments possessed a *general* capacity to contract, and where the instruments might for such a reason be taken without special inquiry into their validity. It is a case where the power to contract never existed—where the instruments might, with equal authority, have been issued by any other citizen of the county. It is a case, too, where the holder was bound to look to the action of the officers of the county and ascertain whether the law had been so far followed by them as to justify the issue of the bonds. *The authority to contract must exist before any protection as an innocent purchaser can be claimed by the holder.* This is the law, even as regards commercial paper, alleged to have been issued under a delegated authority, and is stated in the case of Floyd's Acceptances (*ante*, 173). In speaking of notes and bills issued or accepted by an agent, acting under a general or special power, the court says: 'In each case the person dealing with the agent, knowing that he acts only by virtue of a delegated power, must, at his peril, see that the paper on which he relies comes within the power under which the agent acts. And this applies to every person who takes the paper afterwards, for it is to be kept in mind that the protection which commercial usage throws around negotiable paper *cannot be used to establish the authority by which it was originally issued.*"

So we say here the appellant possessed no *general capacity* to issue bonds; on the contrary, "An irrigation district is a public body, and under the Wright law

has only such powers as are given to it by that act. Such powers are enumerated in the act."

Stimson vs. Alessandro Irr. Dist., 135 Cal., 392.

See also Young vs. Township of Clarendon, 33 L. Ed., (U. S.), 360.

Pierce vs. U. S. Bank, 19 L. Ed. (U. S.), 173.

And Von Schmidt vs. Widber, 105 Cal., 157.

"It may be stated generally that where special powers for the accomplishment of a particular purpose are conferred by statute upon corporations or individuals, the acts conferring such powers are to be construed strictly, and the powers cannot be exercised for any collateral purpose."

26 Am. and Eng. Enc. of Law, (2d Ed.), p. 665.

"Every dealer in municipal bonds which upon their face refer to the statute under which they are issued is bound to take notice of the statute and of all its requirements."

McClure vs. Oxford Twp., 94 U. S., 429.

National Bank of the Republic vs. St. Joseph, 31 Fed. Rep., 216.

"Want of power is always a good defense to an action on municipal bonds. Such bonds issued without authority are *absolutely void*. This want of power generally arises from one of the following causes:

(1) Because the bonds are used for a private and not a public use.

(2.) Because the enabling statute is in violation of some constitutional provision.

(3) *Because the power exercised is different from that delegated.*

(4.) Non-compliance with conditions imposed by the enabling act."

In notes, 15 Am. and Eng. Encyc. of Law, (1st Ed.,) 1292.

See also Aurora vs. West, 22 Ind., 89.

It is Well Settled that When Negotiable Paper is Expressly Made Void by Statute, it is Void in the Hands of Every Holder.

This rule is particularly applicable where such paper is declared by law to be *utterly* void or, as is the case with reference to the Wright Act, (Sec. 42.) *absolutely void.*

In Vallett vs. Parker, Vol. VI., Wendell's Reports, p. 619, the court said:

> "Whatever doubts may have heretofore existed, I take it to be well settled, that as between the original parties to a promissory note, the defendant may show either the want of consideration, or the illegality of it. But when a negotiable instrument has passed in the ordinary course of business into the hands of a *bona fide* holder for valuable consideration, and without notice of the consideration, the general rule is, that the defendant cannot avail himself of any such defence. There are exceptions; two instances are familiar; the case of a note given upon an *usurious* consideration, or for money lost *by gaming*. In both these cases, the notes and securities are declared by the statute to be *absolutely void.* Every man, therefore, who takes an endorsed note, does so at his peril, so far as those con-

siderations may have entered into the original concoction."

The following authorities are decisive upon this question:

Barnes vs. Lacon. 84 Ill., 461.

Town of Eagle vs. Kohn, 84 Ill., 292.

Richeson vs. People, (Ill.) 5 N. E. Rep., 123.

Woodson vs. Barrett, (Va.,) 3 Am. Dec., 612.

Haight vs. Joyce, 2 Calif., 64.

Alabama Nat. Bank vs. Parker, (Ala.,) 40 South, 987.

Snoody vs. Bank (Tenn.) 7 L. R. A., 804; 8 Cyc., 47.

Ward vs. Sogg, 24 L. R. A., 281, (N. C.)

Glenn vs: Farmers Bank, 70 N. C., 191.

Third Nat. Exchange Bank vs. Smith, 125 Pac., 633.

Randolph on Commercial Paper, Sec. 517.

Tiedman on Commercial Paper, Sec. 178.

In section 44 of Burroughs on Public Securities, it is said:

"And while it is true that municipal bonds with coupons attached are commercial paper and pass by delivery, so that a *bona fide* holder is not required to take notice of conditions upon which they are issued, or of resolutions on the records of the railroad company; yet when the statute expressly declares that negotiable securities given under certain circumstances shall be void, the court will hold them void, even in the hands of a *bona fide* purchaser without notice. * * *

It is not the illegality that makes the defence

valid, without notice of the illegality; it is by force of the peremptory words of the statute declaring them void, that they are held to be void in the hands of an innocent endorsee without notice. *

* The illegality which constitutes the want of power in this class of cases, arises not merely from the fact that certain acts are conditions precedent to the issue, but from the declaration of the statute that they *shall not be valid* until the acts are done, or that they shall *be void* if the acts specified are not performed. It is the imperative command of the statute that stamps its impress of invalidity on the bonds."

"The *bona fide* holder for value who has received the paper in the usual course of business is unaffected by the fact that it originated in an illegal consideration, without any distinction between cases of illegality founded in moral turpitude, which are termed *mala in se*, and those founded in positive statutory prohibition which are termed *mala prohibita*. The law extends this peculiar protection to negotiable instruments, because it would seriously embarrass mercantile transactions to expose the trader to the consequences of having the bill or note passed to him impeached for some covert defect. There is, however, one exception to this rule; that when a statute expressly or by necessary implication, declares the instrument *absolutely void*, it gathers no vitality by its circulation in respect to the parties executing it; though even upon such instruments an indorser may, as we shall hereafter see, be held liable.

"There are few cases in which the statute renders such instruments *absolutely void*; and the most

important, if not the only instances now to be met with, are the statutes against usury and gaming."

Daniel on Negotiable Instruments, Sec. 197.

"There are some defenses which are as available against a *bona fide* holder for value, and without notice, as against any other party. They are those which go to show that the instrument was *absolutely* and *utterly* void, and not merely voidable (1) by reason of the incapacity of the party assuming to contract; or, (2) by reason of *some positive interdiction of law*; or, (3) by reason of the want of consent of the party sought to be bound to the particular contract."

Daniel on Negotiable Instruments, Sec. 806.

"A *bona fide* purchaser of negotiable paper for value, before maturity, takes it freed from all infirmities in its origin, *unless it is absolutely void for want of power* in the maker to issue it, or its circulation is by law prohibited. Municipal bonds, payable to bearer, are subject to the same rules as other negotiable paper."

Dillon's Municipal Corporations, Section 513.

In Bayley vs. Taber, 5 Mass., 290, the court said:

"The statute of 1804, C. 58, section 1, enacts that all bills, notes, checks, draughts or obligations whatsoever, under the amount of five dollars, payable to bearer or to order, shall be wholly in writing; and that all notes, etc., under the aforesaid amount and payable as aforesaid which should be made or issued after the first day of April, then next, and which should bear the impression of types, plates, or printing, *should be utterly void*, and that no action should be thereon sustained in any court or law. * * *

"However hard the operation of the statute may appear to be against persons, into whose possession such notes may have come *bona fide*, and for a valuable consideration, it is a hardship created by law for the public good, and the courts of law are prohibited from granting any relief against it."

"There are but few cases in which a bill or note is void in the hands of an innocent indorsee for valuable consideration; such cases are, when the consideration in the instrument is money won at play, or it be given for a usurious debt. The English statutes against usury and gaming (and which have been adopted generally throughout the United States), are peremptory, and make the bill or note absolutely void. The same rule would *of course*, *apply to every case in which the contract is by statute declared absolutely void.*"

Kent's Commentaries, Vol. III., p. 80.

To the same effect are:

Bank vs. Alsop (Ia.), 19 N. W., 863.

Irwin vs. Marquet (Ind.), 59 N. E., 38.

Swinney vs. Edwards (Wyo.), 55 Pac., 306.

Emerson vs. Townsend (Md.), 20 Atl., 984.

Band vs. Portner (Ohio), 21 N. E., 634.

Voreis vs. Nussbaum, 16 L. R. A., 47, p. 47-48.

Wyatt vs. Wallace (Ark.), 55 S. W., 1105.

"This doctrine, as well as the one which protects the purchaser without notice, says Story, 'Is indispensable to the security and circulation of negotiable instruments, and it is founded on the most comprehensive and liberal principles of public policy.' Story, Prom. N., section 191. The only exceptions to this doctrine are those where the paper is *abso-*

lutely void, as when issued by parties having no authority to contract; or its circulation is forbidden by law from the illegality of its consideration, as when made upon a gambling or usurious transaction."

Cromwell vs. Sacramento County, 24 L. Ed. (U. S.), 687.

Where Lack of Power Exists the Plea of Estoppel Is Unavailing.

If the only logical and inevitable conclusion—that these bonds were rendered void by *want of power* to issue them in violation of the Wright Act at the time they were issued and that thereafter, in accordance with that act, they *remained* void—is once admitted, it follows that the doctrine of estoppel, by conduct, ratification or recital, is inapplicable and cannot operate in this case.

In Wichman vs. Placerville, 147 Cal., 164, where municipal bonds were sued upon, the court said:

"The proposition that charters of municipal corporations are special grants of power from the sovereign authority and are *to be strtctly construed*, and that whatever power is not given expressly, or as a necessary means to the execution of expressly given powers, is withheld, is a proposition too well settled to call for discussion. (Douglas vs. Mayor of Placerville, 18 Cal', 645.)

"Equally well settled is it that *want of power* is always a defense to a municipal corporation, and *that no estoppel, by conduct or by ratification*, to raise the question of *want of power*, can be urged

against such corporation. This last is a rule of necessity. If a corporation, by ratification, could validate an act, void as being *ultra vires*, no limit could be set to its powers. It could enter into any contract absolutely without authority at law, and by the simple process of recognition and ratification of the void contract give it validity. Such a rule could not, of course, be tolerated."

See also Sutro vs. Pettit, 74 Cal., 332.

When it is remembered that section 42 of the Wright Act expressly says that the officers of appellant "shall have *no power*" to issue bonds in the manner these bonds were issued, we submit it is idle to contend that the language contained in the last quotation is not in point here.

"Where there is *no power* or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel."

Raisch vs. City, etc., of San Francisco, 80 Cal., p. 6.

In Atlantic Trust Co. vs. Town of Darlington, 63 Fed. Rep., 76, the court said, page 81:

"The principle of estoppel or ratification cannot be applied to a municipal bond issued *ultra vires*. Town of Ottawa vs. Perkins, 94 U. S., 260; Brenhem vs. Bank, 114 U. S., 188."

These bonds were not merely issued *ultra vires*, but were issued in contravention of an *express mandate of the law* and in such a case the situation is beyond the reach of ratification, as was held in Colby vs. Title Insurance and Trust Co., 160 Cal., 632, where the court said:

"That the doctrine of estoppel by conduct or by laches or even ratification has no application to a contract or instrument which is void because it violates *an express mandate of the law* or the dictates of public policy. Such a contract has no existence whatever. It has no legal entity for any purpose and neither action nor inaction of a party to it can validate it, and no conduct of a party to it can be invoked as an estoppel against asserting its invalidity. The authorities are uniformly agreed on this principle, and the following cases, out of a number, are selected on this point, because they involve contracts which, like the instruments alleged by plaintiff to have been executed for an illegal consideration, were declared void as against public policy, and where it was held that the plea of estoppel as against such contracts could not be asserted:

Brown vs. First Nat. Bank, 137 Ind., 655, (37 N. E. 158, 24 L. R. A., 206.)

Langan vs. Sankey, 55 Iowa, 52; (7 N. W. 393.)

Wheeler vs. Wheeler, 5 Lans. (N. Y.,) 355.

Robinson vs. Patterson, 71 Mich., 141; (39 N. W., 21.)

Hardy vs. Smith, 136 Mass., 328.

Stanard vs. Sampson, 23 Okla., 13, (99 Pac., 796.)

McCormick Harvester Mfg. Co., vs. Miller, (Neb.) (74 N. W., 1061.)

Henry vs. State Bank of Laurens, etc., 131 Iowa, 97, (107 N, W., 1034.)

In Marsh vs. Fulton County, 19 L. Ed., (U. S.,) 1042, the U. S. Supreme Court said:

"It is also contended that if the bonds in suit were issued without authority their issue was subsequently ratified, and various acts of the supervisors of the county are cited in support of the supposed ratification. These acts fall very far short of showing any attempted ratification even by the supervisors. But the answer to them all is that the power of ratification did not lie with the supervisors. A ratification is, in its effect upon the act of an agent, equivalent to the possession by him of a previous authority. It operates upon the act ratified in the same manner as though the authority of the agent to do the act existed originally. It follows that a ratification can only be made when the party ratifying *possesses the power to perform the act ratified.*"

In Fountain vs. City of Sacramento, 1 Cal. App., 464, the court said:

"Instances are becoming too frequent where parties endeavor to fix illegal liabilities upon municipalities under the doctrine of equitable estoppel, thus seeking to avoid injurious consequences which they knowingly brought upon themselves."

The clearness of the provisions of section 42 of the Wright Act brings the case at bar within the case of Lukens vs. Nye, 156 Cal., 498, where the court says:

"It is a principle in the English law, that an act of Parliament, delivered in *clear and intelligible* terms, cannot be questioned, or its authority controlled, in any court of justice. (1 Kent's Commentaries, 447.) And in the United States, 'if there be no constitutional objection to a statute, it is with us as absolute and uncontrollable as laws

flowing from the sovereign power in any other form of government. (1 Kent's Com., 448.) * * * The agreement in question being wholly void, and also against public policy, *it cannot be the foundation for an estoppel.*"

Recitals in Bonds are Unavailing Where There is Lack of Power to Issue Such Bonds.

From the authorities we have already cited, we respectfully submit, it is apparent that no estoppel is operative in such a case as this, where the imperative mandate of the uncontrollable law has unalterably limited the powers of a public corporation, and where the same law has explicitly provided that bond sissued in defiance of its express provisions "*shall be and remain absolutely void.*"

It must be conceded that recitals only operate by way of estoppel, and if estoppel cannot cure a void act, neither can a recital. It follows that a recital cannot be held to revive or validate anything done under an assumed, but non-existing power—when the law has not only stamped such thing "void," but also has said that it shall *remain* absolutely void—without striking down the principle, firmly imbedded in our jurisprudence, that any sort of estoppel is unavailing, when the subject at which the estoppel is aimed is a void act, and without striking down the principle, hoary with age, that the transcendent and uncontrollable sovereign power of the legislature cannot be modified, controlled or nullified by the courts.

"The power and jurisdiction of Parliament, says

> Sir Edward Coke, is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving and expounding of laws."
>
> 1 Blackstone Com., 161.

It is elementary that, in the absence of constitutional objection, similar powers are vested in our legislature (Lukens vs. Nye, *supra*), and yet in effect it was urged in the case at bar, that when that legislature has spoken, its words can be ignored; that when it has lucidly said an irrigation district has *no power* to issue a bond in a certain way, and if so issued, such bond shall be and *remain absolutely void*, such edict goes for nothing, providing a certain recital appears in the bond. In fine, a thing made forever dead by the express words of the legislature can be recited into life again.

We submit, that no such startling theory can be upheld without utterly subverting the thoroughly well settled doctrine, enunciated by very numerous cases to only a few of which we have referred, that estoppel goes for naught when it is either confronted by a "want of power" or by the express command of the legislature. In the case at bar the theory of estoppel is manifestly opposed by both of these obstacles.

Coffin vs. Board of Commissioners of Kearney County, 57 Fed. Rep., 137, was a case decided by the Circuit Court of Appeals of the Eighth Circuit. There the court said:

"No doctrine is better established than that a purchaser of municipal bonds is bound to ascertain if the municipality has authority to issue such securities, and that *no recital contained in a municipal bond can cure such a defect as an utter want of power* in the municipality to execute it. Dixon Co. vs. Field, 111 U. S., 83; Town of Coloma vs. Eaves, 92 U. S., 484, 490; Marsh vs. Fulton Co., 10 Wall., 676; Northern Bank of Toledo vs. Porter Township Trustees, 110 U. S., 608, 615; Anthony vs. Jasper Co., 101 U. S., 693, 697; McClure vs. Township of Oxford, 94 U. S., 429."

The recital in these bonds in the case at bar is not a recital of facts, but purely *a conclusion of law.*

In Crow vs. Oxford Township, 30 L. Ed., (U. S.), 388, it is said:

"As against an objection that the bonds were issued in violation of a restriction in the constitution of the State as to the amount of bonds to be issued, it was held by this court, under a registration statute like that in the present case, that no conclusive effect was given by the statute to the registration or to the certificate; that the certificate was no more comprehensive or efficacious than the statement in the bond; that such statement did not extend to or cover *matters of law;* and that a 'certificate reciting the actual facts, and that thereby the bonds were conformable to the law, when judicially speaking, they are not, will not make them so, nor can it work an estoppel upon the county to claim the protection of the law.' "

See also Spitzer vs. Village of Blanchard, 82 Mich., 234.

Brenham vs. German American Bank, 30 30 L. Ed., (U. S.) 396.

Savings and Loan Ass'n vs. Topeka, 22 L. Ed., (U. S.) 461.

Aspinwall vs. Davies Co., 16 L. Ed., (U. S.) 296

South Ottawa vs. Perkins, 24 L. Ed., (U. S.) 154.

District Township of Doon vs. Cummins, 35 L. Ed., (U. S.) 1044.

These case of German Savings Bank vs. Franklin County, 32 L. Ed. (U. S.), 519, is as instructive case upon this subject. There, the bonds, contained recitals, which the plaintiff, who was a bona fide holder, claimed, precluded the county from showing the invalidity of the bonds. Notwithstanding the act under which the bonds were issued, did not declare that bonds not issued in conformity with the act should be void, yet as the contingency controlling the issue of the bonds had not occurred, the bonds were held void, and *a fortiori* the same result should follow in a case where—as in the case at bar—the statute expressly provides that bonds issued in defiance of the statute "*shall be and remain absolutely void.*"

We are not unmindful of the class of cases wherein it is held that recitals in municipal bonds estop the maker of such bonds from setting up a defense based upon "irregularities" *in the exercise of a granted power* and we are aware that some cases have gone so far as holding that irrigation district bonds are subject to the same rule, but we want a single case, in which recovery upon irrigation bonds has been permitted, when such

bonds were issued in the manner in which the bonds in the case at bar and in Hughson vs. Crane (115 Cal., 412), were issued, and *when the attention of the court was drawn to section 42 of the Wright Act.*

The case of Baxter vs. Vineland Irrigation District, 136 Cal., 185, was certainly not such a case. It is true the recitals there were the same as those in these bonds, but the defects there were confined to "irregularties in keeping the records, in conducting the elections, in failing to advertise bonds for sale and like matters." These omissions did not in themselves result in *incurring* any debt or liability by the *issuance* of bonds, within the meaning of the prohibitory language of section 42. The situation here is entirely different, because in this case, a liability was attempted to be incurred—contemporaneously with the issuing of these bonds by the invalid method of exchanging them for labor and commodities—"in excess of the express provisions of the act." (Sec. 42.) It therefore cannot be maintained that these bonds were not issued in the teeth of the statute or were not *ultra vires* and void. This is plainly not a case of "irregularity" in the exercise of a *granted* power, for we have seen that the act, instead of granting power to do what was attempted to be done here, definitely and distinctly says that the district *shall have no power* to do the very thing which was here attempted, and this court has repeatedly so held.

"The authority to dispose of bonds, being by express terms limited to two modes, *excludes all others* by plain implication. It cannot be reasonably said that the

power to exchange bonds for warrants issued for construction work is necessarily implied from the express power to exchange bonds in payment for property. And while it is true that the proceeds of bonds sold constitute the construction fund on which warrants for construction work may be drawn, still *there is no authority* for exchanging bonds for construction work, and there can be no implied authority to exchange bonds for warrants issued for such work."

Leeman vs. Perris Irrigation Dist., 140 Cal., 543.

The only mode in which the board of directors of an irrigation district *can exercise their power* of disposing of the bonds of the district, under the provisions of the irrigation act, so they may become valid obligations against the district, is either to exchange them for property purchased for construction purposes, at their par value, under section 12 of the act, or to sell them for money in the open market, under the provisions of section 16 of the act, at not less than ninety per cent. of their face value; and *they have no power* or right to exchange the bonds for any other purpose, or to make payment with them at ninety per cent. of their face value, in discharge of any obligation of the district, or to dispose of the bonds, or of the moneys received from sales of the bonds, for any other object than to provide for the construction fund contemplated by the act.

Syllabus in Hughson et al., vs. John M. Crane, 115 Cal., 404.

"The board of directors have power to acquire such water works in the manner aforesaid, and to issue the

bonds of the district in payment therefor, and that the board *has no other powers*, except those which are expressly given or are implied as necessary to carry out the main purpose of the act. And it is clear that where, as in the case at bar, a board has taken no steps whatever towards complying with the statute, by constructing or acquiring, or commencing or undertaking to construct or acquire, any system of canals or water works whatever, it has *no power* to give all the bonds of the district for a mere personal promise of another that he will in the future lease some water to the district at a stipulated rent. We agree with the conclusion of the learned judge of the court below, that the bonds to which the coupons sued on were attached *are void.*

Stimson vs. Allessandro Irr. Dist., 135 Cal., 393.

Upon the subject of "recitals," says the Wisconsin Supreme Court:

> "To say that the supervisors had the power to bind the town because they recited that they had, is assuming the whole issue. It is reasoning in a circle. It is like the man pulling to overcome the law of gravitation. *It cannot be done.*"

Veeder vs. Town of Lima, 19 Wis., 298-317.

Here then, we have the important distinction, existing in the case at bar, that the bonds were palpably *ultra vires.* All that the Baxter case really holds is set forth in the following paragraph of the syllabus, viz.:

> "Where it appears that the irrigation district was properly organized, *and that the bonds were within the authority of the board, and not ultra vires*, and the only questions raised related to al-

> leged *irregularities* in the keeping of the records and in conducting the elections which authorized the issuance of the bonds, bona fide purchasers, without notice of such irregularities, who received bonds which were negotiable in form, and which recited a compliance with the law, are protected against any mere irregularities *in the exercise of the granted power*.,'
>
> Baxter vs. Vineland Irrigation District, 136 Cal., 186. (Syllabus.)

Furthermore, in the Baxter case, the trial court found that the bonds "were legally issued and disposed of" (p. 187.)

Now in the Baxter case, the decision, as will be seen from the syllabus, proceeds upon the theory that there the bonds *were within the authority of the board* and not *ultra vires*. Evidently in that case—unlike this case—there was no illegal disposition of the bonds, as the trial court so found, and such defects mentioned in the district proceedings, as irregularities in keeping the records, bear no resemblance to the conditions in the case at bar, which conditions, under the decisions of this court, rendered these bonds void. Bearing in mind the different situation in the Baxter case, let us note further what was there said (although as we have remarked, part of the opinion is mere dicta), particularly a portion of the following extract from what purports to be (but really is not), the main opinion, to-wit:

> "The objections to the proceedings relate to alleged *irregularities* in keeping the records, in conducting the elections, in failing to advertise the

bonds for sale, and like matters. It was held in Meyer vs. Brown, 65 Cal., 583, that the *power of a municipality to issue bonds being conceded*, no question of *irregularity*, or even of fraud, on the part of its agents could be considered where the bonds are in the hands of bona fide purchasers or holders for value without notice of the alleged irregularities. In Pompton vs. Cooper Union, 101 U. S., 196, cited in Meyer vs. Brown, it was said: 'This court has uniformly held, when the question was presented, that where a corporation *has lawful power* to issue such securities, and does so, the bona fide holder has a right to presume the power was properly exercised, and is not bound to look beyond the question of its existence. Where the bonds on their face *recite the circumstances* which bring them within the power, the corporation is estopped to deny the truth of such recital.' ''

Baxter vs. Vineland Irrigation District, 136 Cal., 190.

The quoted language clearly presupposes a case where the power of the corporation to issue bonds *is conceded* and where "irregularities" have occurred. Neither in Meyer vs. Brown nor in Pompton vs. Cooper Union, was there any statute involved, containing the drastic and far reaching provisions of section 42 of the Wright Act, which section, instead of conferring power, expressly withholds it and stamps all bonds issued in violation of the act void forever.

Besides, the bonds here do not recite the *circumstances* which bring them within the power of the district, but the recital is only a legal conclusion. How then can

the quotation be applicable here, when it refers to cases where the municipality was guilty of mere "irregularities" in the exercise of a *granted power* and we have seen there was absolutely *no granted power* to do what was attempted here?

As the decision of the Baxter case was a departmental decision (see 136 Cal., 185,) and as the concurring opinion was the joint opinion of Mr. Justice McFarland and Mr. Justice Temple, it appears that two out of the three departmental judges who participated in the decision, enunciated the doctrine contained in the concuring opinion and consequently, we respectfully submit, the concurring opinion is the ruling opinion of the decision and that what appears to be the main opinion contains only the individual views of the writer. (See *In re* Coburn, 165 Cal., 206, and opinion on rehearing Del Mar Water Co. vs. Eshleman, (167 Cal., 682). The concurring opinion is as follows:

> "McFarland, J., concurring. 'I concur in the judgment. I also concur in the foregoing opinion, unless paragraph 3 thereof can be construed as meaning that bonds of an irrigation district must always be held to be valid beyond question in the hands of a bona fide holder, if they are regular on their face and contain certain recitals. Such district has *only the powers which are given it by statute;* and if, in its name, bonds are issued which are *beyond its power* to issue,—*ultra vires—they are of no more value than is a paper purporting on its face to be a negotiable promissory note of a maker who never signed it, nor authorized any one to sign*

it for him. (See Stimson vs. Alessandro Irr. Dist., 135 Cal., 389.) In the case at bar, however, only the *regularity* of the exercise by the trustees of a *granted* corporate power is involved."

Temple, J., concurred.

An examination of that opinion unmistakably intimates what the opinion of the department was upon the subject, and shows convincingly the interpretation which must be placed upon the whole decision, and it clearly points out the vital distinction existing between an *ultra vires* transaction and irregularity in the exercise of a *granted* power. Furthermore, it places bonds issued in the method followed in the Stimson case—where the identical infirmity existed in the bonds as exists in these bonds—in the same category as a forged promissory note and obviously indicates that a recital will not validate such *ultra vires* paper.

Both opinions in the Baxter case are absolutely silent as to section 42 of the Wright Act and doubtless it was not drawn to the court's attention, and we have yet to find a case where either in a State or federal court, it appears this section 42 has been mentioned, and at the same time void bonds held collectible. That section by its peculiar and stringent language is *sui generis* and other bond cases are therefore not parallel to the case at bar; when however, it is recalled that this Wright Act contemplated that bonds issued under it should "express on their face that they were issued *by authority of this act*," (section 15, statutes 1887, p. 36), and that notwithstanding such recital it was also provided that,

if issued in contravention of the act, these self-same bonds should "be and *remain* absolutely void," it is very apparent that a recital was never intended by the legislature to make any difference whatever with respect to the invalidity of the bonds, because there is no exception or qualification appearing in the sweeping language of section 42 exempting bonds, containing any recitals, from the specific mandate of the legislature.

The Baxter case was cited in Leeman vs. Perris Irrigation District, 140 Cal., 544, but what was there said by Commissioner Chipman, with reference to the fact that the U. S. Supreme Court has held that a recital relieves a purchaser from looking further for evidence of compliance with the conditions annexed to the grant of power, is also *dictum* because that question was not before the court, and the plaintiff was not an innocent holder. Besides, this is not merely a case of recital operating as an estoppel to show a certain contingency or condition had not occurred or had not been complied with; on the contrary, section 42 cuts far deeper than that and plainly deprives the district *of the power* itself, without which power the bonds are as waste paper.

In the case last mentioned, again no mention in the opinion is made of section 42, and in neither that case nor in the Baxter case is the situation different from that in Mersfelder vs. Spring, 139 Cal., 595, where the court said:

> "It is urged that in that decision no reference was made to the provisions of the code bearing on the subject, nor was their effect considered; and

> hence, to use the language of the court in Alferitz vs. Borgwartd, 126 Cal., 207, that the decision 'was not a construction, but a *failure to note* the statute, and upon the authority of that case should be reversed."

So we say here, the cases mentioned, containing the dicta to which we have referred, apparently "failed to note" section 42 and therefore were not a construction of the same. Such being the case, we submit those expressions furnish no real foundation for any decision embracing a question momentous to hundreds of ranchers and horticulturists in similar irrigation districts, from Fresno to San Diego; particularly when to hold that such recitals do work an estoppel inevitably involves overturning the doctrine—upheld in every jurisdiction where the common law is in force—that the solemnly and clearly expressed written will of the legislature contained in a constitutional act cannot be nulified by the decisions of the courts, because the legislative power--to use Blackstone's words—is "well nigh omnipotent."

Upon this subject, says Mr. Endlich:

> "So long as a legislative enactment violates no constitutional provision or principle, it must be deemed its own sufficient and conclusive evidence of the justice, propriety and policy of its passage. The language of Mr. Justice Story, concerning constitutional construction, applies almost equally to that of statutes: "Arguments drawn from impolicy or inconvenience ought here to be of no weight. The only sound principle is to declare *ita lex scripta est*, to follow and to obey."

(See also numerous cases cited in footnote to last quotation.) Endlich on Interpretation of Statues—pgs. 8-9.

So we reiterate, section 42 of this act, when it says such bonds as these are to "*remain absolutely void*," lays down such an obviously plain and perspicuous injuction that it is beyond construction and must be enforced, regardless of consequences.

> "It has, therefore, been distinctly stated, from early times down to the present day, that judges are not to mould the language of statutes in order to meet an alleged convenience or an alleged equity; are not to be influenced by any notions of hardship, or of what in their view is right and reasonable or is prejudicial to society; are not to alter clear words, though the legislature may not have contemplated the consequences of using them; are not to tamper with words for the purpose of giving them a construction which "is supposed to be more consonant with justice" than their ordinary meaning. Where, by the use of clear and unequivocal language, capable of only one meaning, anything is enacted by the legislature, it must be enforced, even though it be absurd and mischievous. If the words go beyond what was probably the intention, effect must nevertheless be given to them. They cannot be construed, contrary to their meaning, as embracing or excluding cases merely because no good reason appears why they should be excluded or embraced. However unjust, arbitrary or inconvenient the intention conveyed may be, it must receive its full effect."
>
> Endlich on the Interpretation of Statutes, pages 7 and 8.

And in construing a statute, the question is not what the legislature meant, but *what its language means*.

"'It may have been an oversight in the framers of the act,' says Parke, B., on one case, 'but we must construe it according to its plain and obvious meaning.' Though the consequence should be to defeat the object of the act, a construction not supported by the language of it cannot be imposed by the court in order to effectuate what it may suppose to be the intention of the legislature. 'Our decision,' says Lord Tenterden, 'may, in this particular case, operate to defeat the object of the act; but it is better to abide by this consequence than to put upon it a construction not warranted by the words of the act, in order to give effect to what we may suppose to have been the intention of the legislature.' *A fortiori*, where a statute in language clear, positive and direct and leading to no absurdity, gives a suitable remedy for an existing evil, though an inadequate one, a construction, which upon the ground of a supposed intention of the legislature to give a more effectual one, would undertake to enlarge the terms of the act, would be unwarranted; and especially in the case of penal statutes, a failure of justice resulting from grammatical and natural meaning of their terms cannot be obviated by a construction which would extend the language beyond such meaning. Again, 'I cannot doubt,' says Lord Campbell, 'what the intention of the legislature was, but that intention has not been carried into effect by the language used * * It is far better that we should abide by the words of a statute than seek to reform it according to the *supposed intention*.' 'The act, says Lord Abinger,

in another case, 'has practically had a very pernicious effect not at all contemplated; but we can not construe it according to that result.'

"In short, when the words admit of but one meaning, a court is not at liberty to speculate on the intention of the legislature, or to construe an act according to its own notions of what ought to have been enacted. Nothing could be more dangerous than to make such considerations the ground of construing an enactment that is quite complete and unambiguous in itself. 'The moment we depart from the plain words of the statute, according to their ordinary and grammatical meaning, in a hunt for some intention founded on the general policy of the law, we find ourselves involved in a 'sea of troubles.' Difficulties and contradictions meet us at every turn. Indeed, to depart from the meaning on account of such views, is, in truth, not to construe the act, but to alter it. But the business of the interpreter is not to improve the statute; it is to expound it. Whilst he is to seek for the intention of the legislature, that intention is not to be ascertained at the expense of the clear meaning of the words. The question for him is not what the legislature meant, but *what its language means*"

Endlich on the Interpretation of Statutes, pp. 9, 10 and 11.

In the light of the foregoing authorities, when the act itself provides for a recital in these bonds, and also squarely says in unambiguous and plain language, without making any exceptions, that such bonds, notwithstanding the recitals, "shall be and *remain* abso-

lutely void," how can it be seriously contended that this language should be interpreted as if it contained a proviso, to the effect that the state of voidness shall not survive a recital or a transfer to an innocent purchaser, and that such purchaser shall acquire with the bond every right and incident belonging to a perfectly valid bond? Yet, we respectfully submit, such an unwarranted addition to the provisions of the act is indispensable to recovery by the respondent in this action, for there can be no state of *remaining* void if these bonds now possess the attributes of validity, and if such qualities can be ascribed to them or if the respondent can recover upon them, then the centuries old accepted theories of statutory construction, and the heretofore unchallenged doctrine, that no estoppel can be claimed with reference to an absolutely void transaction, like the pageant in the "Tempest," have "melted into air, into thin air."

Again, on this subject of recitals, it may be added that, although it has been held that such terms as "in pursuance of," "pursuant to" or "by authority of" import fulfillment of conditions precedent to the signing of the bond (28 Cyc., 1630), yet it would be absurd to say such recital can cover matters and events transpiring, or steps taken *after* the bond is signed and the recital thereby made. (See Mercer vs. Prov. L. and T. Co., 72 Fed., pages 629, 636; Parker vs. Smith, 3 Ill. App., 356.)

It follows that, if the defendant in error is correct in his contention that the words "issue," or "issuing," as

used in the Wright Act, mean simply the authorization and preparation of the bonds *prior to their delivery*, any question respecting their invalidity arising from a subsequent disposition or delivery of the bonds cannot be embraced within the recital in these bonds, to the effect that they are *issued* after a full compliance with the Wright Act, hence, even if the defendant in error were considered an innocent purchaser of the bonds, it is obvious he could not avail himself of this recital to protect himself against any infirmity in the bonds arising from the bonds having been used and delivered, *after* such recital was made, in payment for materials, contrary to the express provisions of the Wright Act.

Point IV.

The court erred in rendering said judgment and findings for the reason that no judgment of the Superier Court, declared these bonds to be valid. (Subdivision (j) of Specification 9—Trans. p. 130).

Very little need be said upon this point. It is alleged in the amended complaint that on December 12, 1890, an action was brought to determine the validity of these bonds. (Tr. p. 25). As none of the bonds sued on were in existence then, it is apparent that the decree rendered in that action, could not validate steps, respecting these bonds, *taken after the action was brought*, Some of the contents of the judgment roll in that proceeding are set forth on pages 120 to 123 of the transcript. Apparently, action was attempted to be brought under authority of what is sometimes called the "Confirmatory Act," relating to Irrigation Districts. (Cal.

Statutes 1889, p. 212). The petition set forth that the board had ordered bonds to the amount of $500,000 to issue, and had accepted a proposition from the Semi-Tropic Company for the *exchange* of all of said bonds at par for certain property. The decree also recites that an order for the *exchange* of these bonds at par, for water, etc., had been made, and the court undertakes to confirm and approve the transaction.

It will be seen this was attempting something which the court did not have jurisdiction to do and the petition on its face, in alleging this contemplated exchange, so shows. (Trans. 120-122).

In Stimson vs. Aless. Irr. Disct., 135 Cal., 394, the Court, in referring to this Confirmation Act, said:

> "The court had only such jurisdiction as was given it by the act. But that act contemplates a confirmatory judgment only in case of a "sale" of the bonds of the district. By section 1 it is provided that the board of directors may commence a "special proceeding" by which the proceedings of the board "providing for and authorizing the issue and sale of the bonds of said district" may be judicially examined and confirmed. By section 2 it is provided that the petition of the board shall set forth all proceedings had "for the issue and sale" of the bonds; and by section 5 it is provided that the court "shall have power and jurisdiction" to examine into and approve all proceedings for the organization of the district, and all proceedings which may affect the legality of the bonds, "and the order of sale, and the sale thereof." It evidently refers to the provisions of the original act for the sale of

bonds, which are to be found in section 16 of that act. *It has no reference to the provisions of section 12, hereinbefore quoted, that in case of purchase of any property authorized to be purchased, bonds may be used at their par value in payment.* But in the case at bar the issuance and delivery of the bonds to the Bear Valley Irrigation Compaay are not within the provisions of either section 12 or section 16; and no jurisdiction to confirm those acts was given to the court by the statute invoked."

It is undeniable that none of the bonds sued upon here was ever *sold*. On the contrary, they were issued under an attempt to come within the provisions of section 12 of the Wright Act (Stowell vs. Rialto Irrigation District, 154 Cal. 221), and to that section, the Confirmation Act is inapplicable.

For stronger reasons, the last named act could not validate future invalid acts of the Irrigation District or its officers, and yet the defects in these bonds arose from antedating and illegal disposition of the bonds, all done and made after the commencement of the confirmatory proceeding. The effect of the proceeding, even when it comes to attempting to confirm a *sale* of such bonds, is also most questionable. (See Tregea vs. Modesto Irr. Dist. 41 L. Ed., U. S., 395.) In the last mentioned case, Mr. Justice Brewer, in referring to this confirmatory act, says: "It may well be doubted whether the adjudication really binds anybody."

Point V.

The court erred in rendering said judgment and findings for the reason that the defendant in error did not

acquire or purchase any of said bonds or coupons without notice of their invalidity. (See Subdivision (1) of Specification 9, Tr., p. 130.)

We have seen that whether or no the defendant in error was an innocent purchaser for value, becomes immaterial, with reference to these bonds, as the effect of section 42 causes them to remain void into whosoever hands they come, if they were originally void, either from antedating or from being illegally delivered, but we deny that the defendant in error could have been an innocent purchaser. As we have seen, he knew that the bonds, delivered under the contract with the Semi-Tropic Company, were not even in existence or printed upon the date they bore (Trans., pp. 63, 64, 68, 69). And he also knew about the arrangement the district had with the Semi-Tropic Company. (Trans, p. 69.)

Furthermore, as to the bonds which he received from the district, under his contract of January 2d, 1895, he he knew also that those bonds were not correctly dated and he must be charged with knowledge of the law which rendered it impossible to validly issue and deliver such bonds in payment for property which was not contemporaneously received by the district.

See Tr., pp. 115, 57.

> "Every person who has actual notice of circumstances sufficient to put a prudent man upon inquiry as to a particular fact, has constructive notice of the fact itself in all cases in which, by prosecuting such inquiry, he might have learned such fact."

Section 19, Civil Code.

In McClure vs. Township of Oxford, 94 U. S., 432, a suit upon interest coupons, the court said:

> "To be a bona fide holder, one must be himself a purchaser for value without notice; or the successor of one who was. Every man is chargeable with notice of that which the law requires him to know, and of that which, after *being put upon inquiry*, he might have ascertained by the exercise of reasonable diligence."

In Lytle vs. Town of Lansing, 147 U. S., 59 a suit in which negotiable bonds "good on their face," were held invalid as to the holder, because of certain suspicious circumstances, the court said:

> "No rule of law protects a purchaser who wilfully closes his ears to information, or refuses to make inquiry when circumstances of grave suspicion imperatively demand it."

It is respectfully submitted that the judgment should be reversed.

F. A. LEONARD,
HOWARD SURR,
LEONARD and SURR.
Attorneys for Rialto Irrigation District.